The Central Law Journal.

SAINT LOUIS, APRIL 6, 1877.

CURRENT TOPICS.

THE subject of costs in criminal cases in this State is one that has caused much dispute in the Circuit Courts, and between the auditor and the clerks. The case of State v. Bingham, decided lately by the Supreme Court of this State, will settle one phase, at least, of the controversy. The defendant was indicted for embezzlement, and, at a term of the court, upon his application, the case was continued at his costs, and judgment was rendered against him therefor. At a subsequent term he was tried and acquitted, and he then filed his motion to set aside and vacate the judgment rendered against him for costs, and have the same taxed up against the State. This motion was overruled, and exceptions were taken to the ruling. Before the Supreme Court it was insisted, that, as the defendant was acquitted, the State was liable for all the costs that accrued throughout the whole trial, and, in support of this view, the court was referred to the statute relating to costs in criminal cases. By section 4, 1 Wag. St. 349, it is provided, that "in all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the State." But the court held that this section only had reference to the costs that accrued at the trial, and which had not previously been adjudged against either party. If, at a previous term, there had been a judgment against the defendant for costs, they would not be comprised within the intendment of this section. "If there was any doubt," say the court, "about the legislative will in this regard, we think it is made perfectly plain by referring to the statute regulating criminal practice, which declares that 'verdicts may be set aside, and new trials awarded, on the application of defendant, and continuance may be granted to either party, in criminal cases, for like causes, and under like circumstances, as in civil cases.' 2 Wag. St. 1104, section 18. This, we think, is decisive of the case, and renders the question too plain to admit of or require argument."

NEWS has been received of the death of Miss Alta M. Hulett, at San Diego, Cal., on the 29th of last month. This lady was well-known throughout the West as one of Chicago's female lawyers, and was perhaps one of the most gifted and successful of the few women, who have, during several years, obtained admission to the bar of that city. Six years ago she commenced the study of the law in Chicago, and was admitted to the Bar of Illinois in the summer of 1873. When forced from physical decline to quit her post, she had, as a woman seeking a place in a man's field, won an enviable position in the face of prejudice, which is powerful, and of mistrust, which is general. She had acquired a good practice, and had inspired both the respect of the bar and the confidence of her clients. But the strain was too much, and, during last winter, she was obliged to quit the bleak shores of Lake Michigan for the valleys of Southern California, in the hope of restoring her shattered health. Of the many arguments which can be urged against what Mr. Mill called the emancipation of women, probably none is so unanswerable, and so free from prejudice, as this single fact of the difference in the constitution of the sexes. This lady had, we believe, in a very high degree, the ambition to rise, and the talents and industry to achieve success; but she lacked that without which all other gifts or acquisitions are in vain,—the vitality and the physical endurance to sustain the strife. It is, no doubt, but male vanity to claim for one sex the monopoly of intellectual power; but it is only an enunciation of the laws of nature to say that a woman was never constituted to do a man's work. The study and practice of the law are peculiarly *his;* for, perhaps, in no other profession is the labor so incessant, the mind so constantly occupied, and the toil so continual and great. It requires an almost superhuman physique to stand it, and it is not strange that a woman, who should essay to keep up with her stronger brothers, should have speedily to fall from the ranks. This is a cost which those females who are constantly urging admission to the professions might profitably study.

A NOVEL QUESTION in the law of accident insurance was recently passed upon in the United States Circuit Court for the Eastern District of New York, in the case of Bayliss v. Travelers' Ins. Co., 6 Ins. L. J. 109. The policy agreed to pay the holder $10,000 in case he should sustain "bodily injuries effected through external, violent and accidental means," and contained the proviso that the insurance should not extend to "any death or disability which may have been caused, wholly or in part, by any surgical operation, or medical or mechanical treatment for disease." The insured, who had been sick for some time, obtained from his physician, who was treating him for his illness, a preparation of opium, with a direction as to the quantity he was to take. The evidence was conflicting as to the symptoms which followed, and the actions of the patient; but the court rendered its opinion on the assumption that the insured took more opium than had been prescribed, or he had intended to take, and that his death was caused thereby. It was contended, on the part of the plaintiff, that the opium was not administered by the hand of the physician, and was not the dose directed by him, but was a dose taken by the insured upon his own judgment, and therefore his act could not bring the case within the proviso above mentioned. The court, however, decided in favor of the defendant, on the ground that, the opium being taken with no other object

than to effect the result that the physician had advised should be attained by using it, the fact that the patient deviated from the direction given by the physician in the matter of amount, and upon his own judgment took a larger dose than had been directed, did not change the character of the act, and that death caused by such an act, done with such an intent, was a death caused wholly or in part by medical treatment for disease, and therefore not covered by the policy. There have been but few decisions upon this particular branch of life insurance, and none, we believe, arising upon the construction of such a provision as that here construed. The decision in this case certainly carries the doctrine of proximate cause as far as it can conveniently be stretched, if not a little farther than it can logically be carried.

CHIEF JUSTICE COOLEY of the Supreme Court of Michigan, whose fame as a jurist is world-wide, and who has just been re-elected to his place on the bench of that state, to do honor for another term to the position which he has for thirteen years so ably filled, in delivering the closing address to the law graduates of this year, of the University of Michigan, spoke at length upon the state of the law as the best evidence of national progress. The laws give us, he said, the best insight into the real character of the people. "The laws are not merely their professions, but they are professions which they consent shall be put into practice. They present us such rules of order, morals, good neighborhood and equality as the people consent to live up to. If these rules tolerate a vice, we know the general sentiment at the time is unwilling to outlaw it. If they condemn a vice, we know that indulgence must be so far exceptional, that the common voice calls for its punishment. If they allow slavery, we know that the evils which attend the institution necessarily prevail; if they prohibit it, and make every person equal before the law, we see that there prevails a benevolent spirit, which insists that every one shall be entitled equally with others to his opportunity to make of his powers the best possible use. In short, the laws give us, in place of the outward professions of the people, such pledges of conduct as they are willing to be tested at the bar of justice and under civil and criminal penalties; and when the laws have changed for the better, this is evidence that the character of the people has changed in like degree." And further on: "The laws," he continues, "give evidence that the people are or are not in the enjoyment of general happiness, according as they show whether the conditions that admit of general happiness are or are not suffered to exist. There are certain evidences here that are infallible; others are of more ambiguous character. The great charter of King John, for example, bears evidence in almost every clause to the misery and degradation of the period immediately preceding it. Rapine and murder, the plunder of industry, the lawlessness of nobles, the degradation of the common people, and the unrestrained tyranny of the king; these are what it certifies to, and neither general industry, general progress, nor general content was consistent with them. The age was unmistakably one of barbarism. On the other hand, if the laws guard the rights of property; if they secure to industry its just reward; if they assure to the people general good order; if they treat the family rights as sacred, and allow to no one an arbitrary dominion of the person of another,—we may feel certain that general content prevails."

That a people's laws are able also to give us a better idea of their religion, than any number of confessions of faith, we admit; and if, as he well states it, by law, England in the fifteenth century burnt heretics, and by law, Spain in the eighteenth tortured them, it is vain that we shall be pointed to churches, cathedrals and abbeys, to holy books and sacraments, as proof that the people were enlightened; for this is denied too positively in the record of their laws. But are even these a sufficient proof? Can the written laws of a country be alone taken as a guide to the habits, the morality, and the condition of a nation? Suppose a descendant of Macaulay's New Zealander should, centuries hence, undertake to write a history of the American people during the first century of their independence, and all other materials being lost, should found his work on a volume of the statutes, say, of this state. He would then recount how the ancient Americans observed the Sabbath, doing no work, except of necessity or charity; he would relate that among them gambling was unknown; that they were a peaceful and non-aggressive people who carried no weapons for their protection; that the suffrage was free and incorrupt, bribery and fraud being high crimes; that betting was not heard of; that bawdy-houses and prize-fighting, and dueling and cock-fighting were unknown; and that murderers were hanged by the neck until they were dead. Such would the historian be forced to write, if he relied on the written laws, and was unable to discover in what manner they were enforced; and that his history was authentic, only the people who had lived under those laws, and the legislators who had established them, and the officers who had not sustained them, would be able to deny. It is not true, as is sometimes said, that we have too many laws; we have too many laws which are not laws, but which are simply words. When a law is needed, it should be enacted, and while it is needed, it should be executed; but just as soon as it has outlived its usefulness, it should be repealed. Any other custom among a community must necessarily bring not only some, but all laws, into contempt.

COUPONS.*

On the 31st day of March, 1871, the National Bank of Newport, New York, received for collection, from certain owners of the Danville, Urbana, Bloomington, and Pekin first-mortgage bonds, their coupons due the next day. The cashier of the bank inclosed them in a package addressed to the First National Bank of New York, and gave the package to a stage-driver, to deliver to the agent of the American Express Company at Herkimer. The stage-driver carelessly left the package on the counter of the Express Company's office in the latter village, and it was stolen by some one as yet unknown. The next day the Newport Bank, having been informed of the loss, telegraphed to the agents of the Railroad Company, and requested stoppage of payment.

On the 3d of April, Mr. Evert Evertsen, a banker at Albany, purchased the stolen coupons. He bought them in the regular course of his business, paying for them in currency, and allowing a premium of ten per cent. for gold. He bought them as he had bought many hundred thousand before that day. He bought them from a stranger; but he bought them without fear of loss to himself from his not being acquainted with the person offering them for sale, because he well knew that the courts had uniformly held that the coupons off negotiable bonds were also negotiable, and that the *bona fide* holder, or purchaser for value, was secure in his ownership, even though he bought from a thief. On the evening of the day on which he purchased the coupons, he forwarded them to his correspondents in New York, requesting them to collect and place the proceeds to his credit. On the 4th of April the coupons were presented, and payment refused, because of the telegram received from the Newport Bank. Two days after his purchase, Mr. Evertsen read a "news item" in the Albany Argus, as follows: "A package containing $2,100 in gold coupons, due April 1st, of the Indianapolis, Bloomington and Western, and Danville, Urbana, Bloomington, and Pekin R. R. Bonds, was stolen Friday while in transit from Herkimer County. They were payable at Farmers' Loan and Trust Company, and at Turner Brothers, New York City."

Mr. Evertsen thereupon sued the Indianapolis, Bloomington and Western Railroad Company, and, that company having paid the amount of the coupons into court, the Newport Bank was substituted in its place in the suit, and Mr. Evertsen and the bank proceeded to litigate their claims to the amount deposited. The referee, to whom the matter was referred, found in favor of Mr. Evertsen, and the finding was sustained by the court. The bank appealed, and the Supreme Court, general term, sustained the former decision in favor of Mr. Evertsen. Again the bank appealed, and the Court of Appeals decided in favor of Mr. Evertsen as regards ten of the coupons, and in favor of the Newport Bank as regards the remaining forty-seven.

As this case presents a question of vital importance, not only to banks and bankers throughout the country who may purchase, collect, or pay coupons, but also to the owners of all kinds of bonds, we propose to examine the reasons which have led the court of last resort of the State of New York to arrive at the conclusion to which we have referred.

It is a familiar rule of law that, in general, a thief can transfer to another no greater title than he himself possesses—that is, none whatever. The great exception to this rule is in the case of negotiable paper; and, to constitute any written instrument negotiable, it is necessary that it should contain an absolute promise, signed by a definite person, to pay to a definite person, or to his order, or to bearer, a certain sum of money, absolutely, and at all events. Such promises to pay, whether under seal or not, if payable to bearer or indorsed in blank, are different from all other classes of property, and the honest purchaser for value, before maturity, acquires title to them even if purchased from a thief, who himself has no title, and can give none.

Every business man can not but agree with the celebrated Lord Mansfield, who, in one of the earliest cases in the Reports, said, that "Trade and commerce would be much inconvenienced by a contrary determination." 1 Smith's Ld'g Cases, 600.

Lord Mansfield, it is true, referred especially to bank notes; but it has now been fully established that the same rule applies to all the other various kinds of negotiable instruments. "Every holder of such paper is presumed to be the owner. The title and possession are considered one and inseparable, and, in the absence of any explanation, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear." "The possession of a bill or note, payable to bearer, or indorsed in blank by one not a party to the instrument, is presumptive evidence of ownership." "One who, for value, obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or any defect in the title of the presumptive owner, is to be deemed a *bona fide* holder." "The power of a thief to sell the stolen paper is derived from a rule of public policy, and his capacity to do any act respecting it must be affected, and, in fact, measured by that rule. This is established solely for the protection of purchasers, and can not be so strained or perverted as to work them an injury." Colson v. Arnot, 57 N. Y. 268. "The party who takes it before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross

*The substance of this article is taken from a pamphlet on the above interesting subject, written by Charles W. Hassler, Esq., of New York City, who has kindly consented to abridge it for this journal.—[ED. C. L. J.

negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part." Murray v. Lardner, 2 Wall. 121.

Such are some of the conclusions at which the higher courts of the State of New York and of the United States have arrived in regard to these matters; and from them we gather that, in order to acquire title to a stolen negotiable instrument, it is necessary that it should be purchased before maturity, for a valuable consideration and in good faith.

Now, Mr. Evertsen paid, in good faith, for all the fifty-seven coupons, a sum within a small fraction of the amount which would have been realized for them, had they been presented by the *owner* of the bonds to the agents in New York City.

It must be noted here, however, that it is a well-established principle that, upon the sale of a non-negotiable written instrument, the purchaser takes it subject to all the equities existing between prior holders.

That bonds, issued under seal, are not thereby deprived of their negotiability has been fully decided. "There are, no doubt, decisions," says Judge Dwight, of the late Commission of Appeals, "that an instrument under seal is not negotiable. These cases refer to private obligations between individuals. They are not to be extended to the case of public securities like those issued by the Government, and intended to seek for a market throughout the civilized world. The seal was not placed there to restrain their negotiability, but rather to stamp them as genuine wherever they might be in circulation." Dinsmore v. Duncan, 57 N. Y. 577. As we have frequently heard the learned author of this opinion state, that the same rule was applicable to railroad, state, and municipal bonds having a seal affixed, we know that it was not his intention to limit his statement to "Government" or United States bonds, as some might suppose from the words used in the opinion. One of the judges of the Supreme Court of Pennsylvania has, indeed, put himself on record as holding in opposition to these views; but even he has had the candor to say: "On this ground we stand alone. All the courts, American and English, are against us." (!) Diamond v. Lawrence Co., 37 Penn. St. 358.

A coupon bond may be said to consist of two parts: First, the bond proper, containing the promise to pay the principal and interest at certain definite periods; and, second, the coupons, being detachable portions of the complete instrument, by means of which the specified payments of interest may be collected as they become due. Decisions, almost without number, sustain the statement that coupon bonds, "when expressed in negotiable words," follow the same rules as are applicable to other instruments similarly worded. 2 Daniel's Neg. Instr. 435. And, had Mr. Evertsen bought the fifty-seven bonds with the coupons of April 1, 1871, attached, it is scarcely possible that the Court of Appeals should have decided that he had title to only ten of them.

And, as to *detached* coupons, the Supreme Court of the United States (City v. Lamson, 9 Wall. 483) has given a decision, in which Justice Nelson says: "The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature. * * These coupons are, substantially, but copies from the body of the bond in respect to the interest, and, as is well known, are given to the holder of the bond for the purpose, first, of enabling him to collect the interest at the time and place mentioned, without the trouble of presenting the bond every time it becomes due; and, second, to enable the holder to *realize the interest due*, or to become due, by *negotiating the coupons* to the bearer in business transactions on whom the duty of collecting them devolves. This device affords great convenience to all persons dealing in these securities, especially to the holder in foreign countries, who otherwise would be obliged to forward the bond to the place of payment of the interest every time it became due, or trust them to the hands of their correspondents in the country where the payment is made." After further comments on the "great convenience" of these coupons, the court decided that they were negotiable, subject to the usual rules, *independent of the bonds*, and such suit was not barred by the statute of limitations, unless the lapse of time was sufficient to bar also a suit upon the bonds. In another case, the same court has held that "the coupon, if in the usual form, is but a repetition of the contract in respect to the interest." Lexington v. Butler, 14 Wall. 296; and see Aurora City v. West, 7 Wall. 105; White v. V. & M. R. R., 21 How. 575.

This leads us to inquire, what did the Supreme Court consider the "usual form?" The expression is used: "*Coupons* attached as *interest warrants* to bonds." And again: "The *interest warrants*, payable on the 1st of September, 1858," etc. But, when we examine the wording of the coupon thus described, we find that, in each case, there was a promise to pay to the bearer or holder a certain sum, absolutely, and on a certain specified date.

For instance (Moran v. Commissioners, 2 Black, 728):

AUDITOR'S OFFICE,
Miami County, Peru, Indiana.

The Treasurer of said county will pay the legal holder hereof One Hundred Dollars on the 1st day of September, 1857, on presentation hereof, being for interest due on the obligation of said county, No. 16, given to the Peru and Indianapolis Railroad Company.

By order of the Commissioners,
IRA MENDENHALL, County Auditor.

Again (City of Kenosha v. Lamson, 9 Wall. 474):

$25. THE CITY OF KENOSHA, WIS.,

Will pay to the bearer Twenty-five Dollars on the 1st day of September, 1860, at the People's Bank, in the City of New York, on presentation of this coupon,

being the interest due on that day on the bond of said city, numbered 1, dated this 1st day of September, 1857. G. H. PAUL, Mayor.

H. T. WEST, Clerk.

In another case before the Supreme Court, the coupon, as given in evidence, reads as follows (Woods v. Lawrence, 1 Black. 405):

COUNTY OF LAWRENCE,

Warrant No. 37, for Thirty Dollars; being for six months' interest on Bond No. ——, payable on the 1st day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company in Philadelphia.

$30. ————, Clerk.

—but a careful reading of the case shows that the question of the negotiability of the coupons so worded was not raised, and that no decision was given on that point.

Ten of the coupons bought by Mr. Evertsen read as follows:

$35. THE INDIANAPOLIS, BLOOMINGTON, AND WESTERN RAILWAY CO. $35.

Will pay the bearer, at its Agency, in the City of New York, Thirty-five Dollars in gold coin, on the 1st day of April, 1871, for semi-annual interest on Bond No. ——.

A. T. LEWIS, Secretary.

And the other forty-seven were as follows:

INTEREST WARRANT FOR THIRTY-FIVE

$35. DOLLARS, $35.

Upon Bond No. ——, of the Danville, Urbana, Bloomington and Pekin Railroad Company. Payable in gold coin, at the office of the Farmers' Loan and Trust Company, in the City of New York, April 1st, 1871.

W. J. ERMENTROUT, Secretary.

The Supreme Court of New York decided that both these coupons were negotiable instruments, and that Mr. Evertsen, having purchased them in good faith for value, held them as against all claimants. Evertsen v. First Nat. Bank, 4 Hun, 692. But, as we have previously said, the Court of Appeals has just decided that he acquired title only to the ten Indianapolis, Bloomington and Western coupons. "The coupons of the Indianapolis, Bloomington and Western Railway Company," says Judge Allen, in the opinion concurred in by all, "being promissory notes, they necessarily had all the characteristics of such instruments, and were entitled to the benefit of the days of grace allowable on bills and notes payable at a given day, or on time." 3 Alb. L. J. 350 (May 13, 1876.) In regard to the other forty-seven coupons, the opinion says: "The coupons of the Danville, Urbana, Bloomington and Pekin Railroad Company, termed upon their face "Interest Warrants," are in somewhat different form. Whether they are within that description of property to which a title may be acquired by a *bona fide* transferee for value, notwithstanding a defect of title in the transferrer, depends upon their negotiability." And then the court holds that these "warrants" are not negotiable, not having the necessary requisites of negotiable paper, and that, therefore, Mr. Evertsen acquired no better title than that of the thief—none whatever.

Considering the distinction thus so distinctly laid down by the highest court of the State of New York, within the borders of which so many coupons are payable, to be of very great importance, we have copied the coupons from some of the bonds now in our safe, and herewith present them:

$20. STATE OF ALABAMA. $20.

Twenty Dollars will be due and payable on the first Monday of July, 18—, at the Financial Agency of the State of Alabama in the City of New York, being half year's interest on Bond No. ——, issued by authority of the State of Alabama on 1st October, 1868.

————, for Treasurer.

CLINTON, HENRY COUNTY, January 1st, 1870.

$50. THE COUNTY OF HENRY $50.

Acknowledges to owe the sum of Fifty Dollars, on the 1st day of ——, 18—, being interest on Bond No. ——, for One Thousand Dollars. This Coupon payable at the National Park Bank, in the City of New York.

————, Clerk Henry Co. Court.

TOLEDO AND WABASH RAILWAY CO. $35.

INTEREST WARRANT

For Thirty-five Dollars, payable in the City of New York, May 1st, 1875, for six months' interest on Equipment Bond for $1,000, No. ——.

————, Treasurer.

Under the ruling of the Court of Appeals, a purchaser of either of the above three coupons would only acquire such title as was had by the person from whom he bought.

$8. RICHMOND, RAY COUNTY, MISSOURI, November 2d, A. D. 1868.

THE COUNTY OF RAY

Acknowledges to owe the sum of Eight Dollars, payable to bearer, on the 1st day of January, A. D. 18—, at the American Exchange National Bank in New York, for one year's interest on Bond No. ——.

————, Clerk

Of the County Court of Ray County, Missouri.

The following coupons are in the usual form:

NORTHERN PACIFIC RAILROAD COMPANY

Will pay to bearer, at the office of Jay Cooke & Co., in the City of New York,

THIRTY-SIX 50-100 DOLLARS GOLD,

being interest due the 1st July, 1876, on Bond No. ——.

————, Treasurer.

THE CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY $35.

Will pay the bearer, at its agency in the City of New York, Thirty-five Dollars, in coin, on the 1st day of ——, A. D. 18—, for semi-annual interest on its First-Mortgage Bond No. ——.

————, Secretary.

The following two coupons contain a proviso with regard to payment to the registered owners:

On the 1st day of ——, 18—, $35.

THE NEW YORK AND OSWEGO MIDLAND RAILROAD COMPANY

Will pay, at its office in the City of New York, on surrender of this Coupon, to bearer, or in case of registration, then to the registered holder, or order, Thirty-five Dollars for interest due on that day on its convertible Bond No. ——.

————, Treasurer.

On the 1st day of August, 1876, $35.

THE NEW JERSEY MIDLAND RAILWAY COMPANY

Will pay, at its agency in the City of New York, on

surrender of this Coupon, to bearer, or, if registered, to the registered holder hereof, or order, Thirty-five Dollars in U. S. gold coin, for interest due on its First-Mortgage Bond No. ——.

————, Secretary.

It may be noticed that we have copied the coupons from "defaulted" bonds. We have done so with this object in view: Owners of bonds sometimes wish to dispose of their overdue coupons, even for the small sums for which they have sometimes been salable—often, if, indeed, they will bring any price. And sometimes bankers and others purchase such overdue coupons from the holders, without careful inquiry into their ownership. In neither case, whether the coupons belong to the one class or the other, will a good title be obtained, free of the equities, if the coupons are more than three days overdue; but, if the coupons are just due, then the distinction into the classes, as above indicated, should be carefully observed.

Another question which may now, under the ruling of the Court of Appeals, present itself to those paying "Interest Warrants," will be: Shall they not, for their own protection, pay them only to the identified and responsible *bona fide* owners of the bond?

And still another question which may arise is this: Should a banker purchase from a thief a negotiable bond, to which *per se* he would acquire title if bought *bona fide*, but to which overdue "Interest Warrants" are attached, would he acquire a good title to the bond with all its overdue coupons, or would he acquire title only to the bond and such coupons as had not yet become due? Boss v. Hewitt, 15 Wis. 260; Newell v. Gregg, 51 Barb. 263; Texas v. Hardenberg, 10 Wall. 68; Vermilyea v. Admr., 21 Wall, 145; and see First Nat. Bk. v. County Comms., 14 Minn. 79; Arents v. Commonwealth, 18 Gratt. 750.

We throw out these suggestions in the hope that Mr. Evertsen's experience may be a warning to others.

FOREIGN JUDGMENT—PLEADING—JURISDICTION.

PHELPS v. DUFFY.*

Supreme Court of Nevada.

HON. THOMAS P. HAWLEY, Chief Justice.
" W. H. BEATTY, } Associate Justices.
" O. R. LEONARD, }

1. FOREIGN JUDGMENT—JURISDICTION NEED NOT BE ALLEGED.—In bringing suit upon a judgment recovered in a sister state it is not necessary to allege in the complaint that the court, in which the judgment was rendered, had jurisdiction either of the subject-matter of the action, or of the defendant. Want of jurisdiction is matter of defense.

2. PRACTICE ACT.—If section 59 of the practice act applies to foreign judgments, then the complaint is sufficient in this case, for the reason that it conforms to the provision of this section.

*To appear in 11 Nevada Rep.

APPEAL from the District Court of the First Judicial District, Storey County.

T. W. W. Davies and *Thos. Wells*, for appellant; *Lewis & Deal*, for respondent.

BEATTY, J., delivered the opinion of the court:

This is a suit upon a judgment. There was a general demurrer to the complaint, which was overruled, with leave to answer. Failing to answer in time, the defendant was defaulted, and judgment thereupon entered for the plaintiff. On appeal from the judgment, the only question presented is this: Does the complaint state facts sufficient to constitute a cause of action? The specific objection to the complaint urged upon the argument is, that it does not show that the court in which the judgment is alleged to have been recovered had jurisdiction, either of the subject-matter of the action, or of the defendant. The portion of the complaint to which this objection applies is as follows: "That on, etc., at the city and county of San Francisco, state of California, in the District Court of the Fourth Judicial District of the State of California, in and for the said city and county of San Francisco, in an action therein pending between plaintiff and defendant, said court last above-mentioned, duly adjudged that plaintiff should have and recover," etc.

In support of the demurrer, we have been referred to a great many cases in which it has been held that a judgment has no validity outside of the state in which it has been obtained, unless the court by which it was given had jurisdiction of the subject-matter, and of the parties. This proposition is not disputed; and there can be no doubt that, in an action of this kind, where the fact of jurisdiction is put in issue by proper pleadings, the plaintiff must fail at the trial, unless he can show the facts necessary to confer jurisdiction. But whether jurisdiction must be alleged in the complaint, either in general terms, or by specific averment of the facts necessary to confer it, is another question. Very few of the cases cited by appellant touch this question; and there was but one in which it was directly involved and decided. That was the case of McLaughlin v. Nichols (reported in 13 Abb. Pr. R. 244), decided by the Supreme Court of the Second District of New York. No other case that has fallen under my observation goes to the same extent; and that case is scarcely reconcilable with the decisions of other courts of higher authority in New York. It has, however, led both Wait and Abbott, in their works upon forms and practice, to state the rule to be, that the complaint, in this class of actions, must at least show that the court in which the judgment was rendered was a court of general jurisdiction. Estee states the rule otherwise. In view of this diversity of opinion, it becomes important to inquire what were the approved precedents for declarations upon foreign judgments in England, before the new rules of pleading introduced by the adoption of the Code.

These precedents will be found in the second volume of Chitty's pleadings, pp. 244 and 413; and neither those in debt (which was the proper form of action on the judgment of a sister state), nor those in assumpsit, contain any allegation as to the jurisdiction of the court. These precedents are founded upon decisions made before and about the time of the Revolution, by the courts of highest authority in England. In framing them, Mr. Chitty had the case of Walker v. Witter, 1 Doug. 5, decided by Lord Mansfield, in the King's Bench, in 1778, directly in view; and the form he gives of a declaration in debt upon a Jamaica judgment is taken from that case, leaving out what the court there decided to be surplusage; among other things, the statement, that the court in Jamaica was a *court of record*.

The authority of Mr. Chitty upon questions of plead-

ing has always been very high, and there can be no doubt that his precedents have been generally followed in this country in the numerous actions upon state judgments that have been brought since their publication. The fact that but one case can be found, in which the form of declaration sanctioned by him has been held substantially defective, is the best sort of proof that it is generally esteemed sufficient. In fact, it is clearly to be implied from the language of the cases that want of jurisdiction is matter of defense. It seems to be established that defendant can take advantage of it by pleading the general issue; but there never could have been any question of this, as there frequently has been, if it had been considered necessary that the declaration should allege jurisdiction.

The case of Kibbe v. Kibbe (Kirby, 119) was decided in Connecticut in 1786, before Chitty wrote, but after Lord Mansfield's decision in Witter v. Walker, *supra*. The attorneys in that case certainly did not understand the rule to be as contended for. For, the defendant having pleaded specially want of jurisdiction in the foreign court, the plaintiff *replied* the facts which he claimed gave jurisdiction. Issue in law was finally joined upon demurrer to the sur-rejoinder.

Of course, under the rule that judgment must be given upon the whole record against the party who has committed the first fault in pleading, it was proper for the court to pronounce upon the sufficiency of the declaration. This they did, and decided that it was fatally defective, because it did not allege facts necessary to confer jurisdiction. It is evident, however, that this point was not necessarily in question, because the pleadings subsequent to the declaration showed affirmatively that the foreign court did not have jurisdiction.

The case of Thurber v. Blackbourne (1 N. H. 242) was also decided upon the ground that the *record* did not show jurisdiction in the foreign court. But I am inclined to infer, from the language of the opinion, that the judgment in that case had been pleaded with a *profert*, and set out upon *oyer* demanded, and that the record spoken of was not the pleadings in that case, but the exemplified judgment of the foreign court. But, however this may be, there are no other cases that support the appellant, and the authority of these cases is very weak against the strong negative testimony in favor of the correctness of Chitty's forms.

The case of Newell v. Newton (10 Pick. 470) is not in point; for that involved the sufficiency of a plea in abatement, upon the ground of the pendency of another action for the same cause in another case. Pleas in abatement are judged by stricter rules than declarations; they must be certain to every intent, and defects in them may be reached by general demurrer, which in declarations can only be reached by special demurrer.

The case of Wheeler v. Raymond (8 Cowen, 311) also involved the sufficiency of the same plea, and it was sustained. A *fortiori*, a declaration in substance the same would have been held good. Yet, in that case it was not alleged that the Vermont court was one of general jurisdiction; neither were all the facts necessary to confer jurisdiction alleged. This was one of the objections taken to the plea, and in reference to which the court says (p. 314): "In pleading the judgments of courts of limited jurisdiction, it is necessary to state the facts upon which the jurisdiction of such courts is founded; but with respect to courts of general jurisdiction, such averments are not necessary." From which it appears that in the absence of any allegation on the subject the court in Vermont was presumed to be a court of general jurisdiction. This was certainly in conflict with the case of McLaughlin v. Nichol, *supra*. (See also 27 Wend. 485.)

My conclusion is, that the complaint in this case is sufficient, without reference to any of the provisions of our pactice act. If section 59 applies to suits upon foreign judgments, as is held in Halstead v. Black (17 Abb. Pr. R. 227), and there is no decision to the contrary, it is sufficient, for the reason that it conforms to the provisions of that section. Judgment affirmed.

NEGLIGENCE—LIABILITY OF OWNER FOR ESCAPE OF WATER—VIS MAJOR OR ACT OF GOD PROXIMATE CAUSE OF DAMAGE.

NICHOLS v. MARSHLAND.*

English Court of Appeal, December 1876.

1. LIABILITY OF ONE WHO STORES WATER ON HIS OWN LAND—ACT OF GOD OR VIS MAJOR.—One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damages effected by an escape of the water, if the escape be caused by the act of God, or *vis major*, *e. g.*, by an extraordinary rainfall, which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented.

2. CASE IN JUDGMENT—THE RULE IN FLETCHER V. RYLANDS.—On the defendant's lands were ornamental pools containing large quantities of water. These pools had been formed by damming up with artificial banks a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell, so that the artificial banks were carried away by the pressure, and the water in the pools, being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the maintenance or construction of the pools, and that the flood was so great that it could not reasonably have been anticipated; though, if it had been anticipated, the effect might have been prevented. *Held*, affirming the judgment of the court of Exchequer, that this was in substance a finding that the escape of the water was caused by the act of God, or *vis major*, and that the defendant was not liable for the damage. Rylands v. Fletcher, Law Rep. 3 H. L. 330, distinguished.

APPEAL from a judgment of the Court of Exchequer (Kelly, C. B., Bramwell and Cleasby, BB.), making absolute a rule to enter the verdict for the defendant. The facts are fully set out in the report of the case in the court below. Law Rep. 10 Ex. 255.†

For the present purposes they are sufficiently stated in the judgment.

June 13, 14, *Cotton, Q. C.*, (*McIntyre, Q. C.*, and *Cozon*, with him), for the plaintiff, appellant.

Assuming the jury to be right in finding that the defendant was not guilty of negligence, and that the rainfall amounted to a *vis major*, or the act of God, still the defendant is liable, because she has, without necessity and voluntarily for her own pleasure, stored on her premises an element which was liable to be let loose, and which, if let loose, would be dangerous to her neighbors. One who keeps a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and if he does not, is liable for the damage caused, though innocent of negligence. May v. Burdett, 9 Q. B. 101, 112, 16 L. J. (Q. B.) 64, 67. The House of Lords has decided that water is in the same category. Rylands v. Fletcher, Law Rep. 1 Ex. 265, 279; affirmed Law Rep. 3, H. L. 330, 339, 340. So, though a railway company, when authorized by statute to use locomotives, is not liable for damage done by

* L. R. 2 Ex. D. (C. A.) 1.

† The full report of the argument and judgment in the Court below will be found in 2 Cent. L. J. 523.

sparks of fire, if they have taken all reasonable precautions and are not guilty of negligence, (Vaughan v. Taff Vale Ry. Co., 5 H. & N. 679, 29 L. J. (Ex.) 247), yet they are liable when not expressly authorized by statute. Jones v. Festinog Ry. Co., Law Rep. 3 Q. B. 733. These authorities were all discussed in Madras Ry. Co. v. Zemindar of Carratenaqurem, Law Rep. 1 Ind. App. 364, 385, where the defendant was held not liable on the ground that it was his duty to maintain reservoirs on the premises. The present defendant was under no such duty. Even if she be considered innocent of wrongdoing, why should the plaintiff suffer for the defendant's voluntary act of turning an otherwise harmless stream into a source of danger? But for the defendant's embankments, the excessive rainfall would have escaped without doing injury. The fact of the embankments being so high caused the damage. They ought to have been much higher or less, or the weirs ought to have been much larger and kept in order. Even if *vis major* does excuse from liability, the *vis major* must be the sole cause of the damage, which it was not here. Such a storm as this occurs periodically, and may be foreseen, and is therefore not the act of God or *vis major* in the sense that it excuses from liability.

Gorst Q. C. and *Hughes*, (*Dunn* with them), for the defendant, cited Carstairs v. Taylor, Law Rep. 6 Ex. 217; McCoy v. Danley, 20 Penn. St. 85; Tennent v. Earl of Glasgow, 1 Court of Session Cases, 3rd Series, 103.

Cur. adv. vult.

Dec. 1. The judgment of the court, Cockburn, C. J., and Mellish, L. JJ., and Baggally, J. A., (Archibald, J., who was a member of the court when the case was argued, died before the judgment was rendered), was read by

MELLISH, L. J.—This was an action brought by the county surveyor, under 43 Geo. 3, c. 59, s. 4, of the County of Chester against the defendant, to recover damages on account of the destruction of four county bridges, which had been carried away by the bursting of some reservoirs. At the trial before Cockburn, C. J., it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the 18th day of June, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed, the dams at their end gave way, and the water out of the lakes carried away the county bridges lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that, if the flood could have been anticipated, the effect might have been prevented.*

Upon the finding, the Lord Chief Justice, acting on the decision in Rylands v. Fletcher, *supra*, as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The Court of Exchequer have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us.

The appellant relied upon the decision in the case of Rylands v. Fletcher, *supra*. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer Chamber. "We think the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps, that the escape was the consequence of *vis major*; or the act of God; but as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient." It appears to us that we have two questions to consider. First, the question of law, which was left undecided in Rylands v. Fletcher: Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law books, the act of God? And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that, when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity.

We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making of a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more, as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor, the case of Rylands v. Fletcher, (Law Rep. 3 H. L. 330) establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of Rylands v. Fletcher, Law Rep. 3 H. L. 330, in this, that it is not the act of the defendant in keeping this reservoir,—an act in itself lawful,—which alone leads to the escape of the water, and so renders wrongful that which, but for such escape, would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant can not, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies were the real cause of its escaping, without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself, by proving that the water escaped through the act of God.

The remaining question is, did the defendant make out that this escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been antici-

* The judgment of the court below, read by Bramwell, B., states the finding thus: "In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*.

pated, although, if it had been anticipated, the effect might have been prevented; and this seems to us, in substance, a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from guilt; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of Nugent v. Smith, 1 C. P. D., 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was, indeed, ingeniously argued for the appellant, that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood, is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.

On the whole, we are of opinion that the judgment of the Court of Exchequer ought to be affirmed.

JUDGMENT AFFIRMED.

The question whether the rule should be made absolute for a new trial, on the ground that the verdict was against the evidence, was reserved for future discussion, if the plaintiff should desire it.

CUMULATIVE PUNISHMENT — LIBEL — CRIMINAL PROCEDURE.

STATE v. BOOGHER.

Saint Louis Court of Appeals, March Term, 1877.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

1. LIBEL OF CORPORATIONS.—A person may be criminally prosecuted for libel upon a business corporation, without alleging that the corporation has sustained any damage thereby.

2. JOINDER OF SEPARATE OFFENSES—CUMULATIVE PUNISHMENT.—At common law and in Missouri, counts for distinct misdemeanors may be joined in the same information, and the defendant may be sentenced for more than one offense at the same time. People *ex rel.* Tweed v. Lipscomb, 60 N. Y. 559, and U. S. v. Maguire, 3 Cent. L. J. 273, disapproved.

3. CRIMINAL PROCEDURE.—In such cases, a separate penalty should be assessed on each count, and the judgment should not lump the punishment assessed, but apply each penalty to its own offense.

4. DEATH OF TRIAL JUDGE.—Where the trial judge dies after motion for new trial overruled, but before settling the bill of exceptions, and before the time for filing same has expired, the succeeding judge should award a new trial.

APPEAL from St. Louis Court of Criminal Correction.

W. H. H. Russell, Robert W. Goode, and *Marshall & Barclay*, for appellant; *Henry A. Clover, Chas. P. Johnson* and *Frank J. Bowman*, for respondent.

HAYDEN, J., delivered the opinion of the court:

This is a criminal prosecution for an alleged libel upon the Life Association of America, a corporation engaged in the life insurance business. There are five counts in the information, only the first, third and fifth of which need be considered. Each of these three counts charges a distinct offense, and sets out different matter. The form of the counts is substantially as follows:

"That * * * Davis R. Boogher, etc., * * * being persons of envious * * * minds, and of most malicious dispositions, maliciously * * * intending, as much as in them lay, to injure, vilify and defame the credit and business reputation of the Life Association of America, a corporation duly chartered according to the laws of the State of Missouri, wickedly, maliciously and unlawfully did write and publish, and cause and procure to be written and published, a certain false, malicious and scandalous libel of and concerning the said Life Association of America, on or about the 13th day of March, 1875, at St. Louis aforesaid, according to the terms and effect following:" (Here follows the alleged libel, which purports to be a statement of the facts recited in an application by policy-holders to the State Insurance Department, praying an examination into the affairs of the Life Association) "against the peace and dignity of the State." The case was tried by Judge Colvin and a jury, and a verdict rendered by which the jury found the appellant guilty as charged in the first count of the information, and assessed his punishment at a fine of fifty dollars; guilty as charged in the third count, and assessed the punishment at two months' imprisonment; guilty as charged in the fifth count, and assessed the punishment at a fine of one hundred dollars. Upon this verdict the court adjudged that the appellant pay a fine of one hundred and fifty dollars, and be imprisoned in the work-house of the city of St. Louis for two months. On the 14th day of March, 1876, the appellant filed his motion for a new trial, which motion was, on the 23d day of March, overruled. On the 24th day of March an appeal was granted to this court, ten days being allowed to appellant within which to file his bill of exceptions. On the 3d day of April, 1876, upon a stipulation to that effect filed by counsel, twenty days' further time were given to appellant to file his bill of exceptions. On the 16th day of September a bill of exceptions was presented to the court for allowance and signature, but the court refused to allow or sign it. Upon this the appellant, by leave of court, filed a motion for a new trial. On the 18th day of November this motion for a new trial was overruled. On the 29th day of November, 1876, an appeal was allowed to this court, and a bill of exception filed, which appeal is the present appeal.

The facts that have rendered a recital of these matters necessary are, that on the 28th day of March, 1876, Judge Colvin became ill, and was unable to do duty afterwards; that, on the 29th day of March, James C. McGinniss was appointed provisional judge; that, on the 12th day of April, Judge Colvin died; that Judge Cady, having been appointed in Judge Colvin's place, entered on the discharge of his duties on the 29th day of April. The bill of exceptions presented to Judge Cady, and by him signed on the 29th day of November, contains the contents of the paper which he had refused to allow as a bill of exceptions, and sets out facts as above. This paper had previously been presented to the counsel for the prosecution on the 26th day of April, when they refused to consent to it, they contending that it was not full or correct. The appellant suggests the question, but appears not much to rely upon the point, whether a corporation, as such, can be the subject of a criminal libel. At the present day there can be no doubt that it may. The reasons why it should are not so numerous as in case of a natural person; but those which exist are as strong. A very large and important part of the private business of the community is now done under the form of corporations. The reputation of persons who employ

this form is as important to them, as is that of a person who deals in his individual capacity to him. On the other hand, the public mischief, the danger to good order and to the peace of the community arises as well from malicious defamation of private corporations, as from libelous attacks on natural persons. Moreover, as business acts and relations involve moral and personal conduct, it is not merely in reference to their business that persons might be defamed without redress, were libels on private corporations permitted. It would be against the reason of the law, if, under the guise of attacking a mere legal entity, a libeler should be allowed to do a wrong to many, which he could not safely perpetrate in reference to an individual. The objection, in truth, arises from conceptions, which the different functions now accomplished by the corporate form have rendered obsolete, and we have no hesitation in holding that a person may be criminally prosecuted for libel upon a business corporation. See Bishop on Crim. Law, 6th ed., vol. 2.. § 934; Wharton on Crim. Law, 7th ed., vol. 2, § 2540; 23 N. J. (Law) 407; 9 Minn. 133. It is next urged that there was no averment of special damage suffered by the corporation. But the rule invoked by the appellant, that, where the words are not in themselves actionable, special damage must be averred, is not applicable to a criminal prosecution for libel. Here the ground of the proceeding is not any damage sustained by the subject of the libel, nor is it even any injury actually done to the public. If it should appear that no damage was done to the person or corporation libeled, and that the public peace was not in fact disturbed, this would not defeat the prosecution. The ground of the criminal prosecution is the public mischief which the libel is calculated to produce, not that which it actually produces.

The points next to be considered are, whether the counts, charging separate and distinct offenses, may be joined in one information, and whether, the jury having separately found the defendant guilty on three of these, and assessed distinct penalties, the court could render judgment to the full extent of the penalties so awarded. It is claimed that there was error in these respects, and we are referred to the cases: People *ex rel.* Tweed v. Lipscomb, 60 N. Y. 599, and U. S. v. Maguire, 3 Cent. L. J. 273. The supreme court of this state appears to have come, many years ago, to an opposite conclusion to that arrived at by the New York Court of Appeals, as to what was the common law of England on these points, and an examination of the English authorities will confirm the opinion of our supreme court. It is noticeable that the language used by Lord Ellenborough, in Rex v. Jones, 2 Camp. 131, though the case is not referred to, is substantially adopted by the supreme court in Storrs v. State, 3 Mo. 9. Lord Ellenborough said: "In point of law there is no objection to a man being tried on one indictment for several offenses of the same sort. It is usual, in felonies, for the judge in his discretion to call upon the counsel for the prosecution to select one felony and to confine themselves to *that*, but this practice has never been extended to misdemeanors. It is the daily usage to receive evidence of several libels, and of several assaults, upon the same indictment," etc. No English cases appear to have been found denying this rule, and many are found which directly or indirectly confirm it, and show clearly that in cases of misdemeanor, at least, counts for distinct offenses may be joined in the same indictment, and the defendant sentenced as for more than one offense at the same trial. Rex v. Wilkes, 4 Burr. 2527; Young v. The King, 3 T. R. 98, per Lord Kenyon, The King v. Johnson, 3 M. & S. 539; Reg. v. Chamberlain, 10 Cox Cr. Cases, 489. In The Queen v. Castro, *alias* Orton, *alias* Tichborne, 92 E. Law R. 250, the indictment was for perjury, and contained counts for two distinct offenses, one committed on the Tichborne trial before Bovill, C. J., in the common pleas, and the other before a commissioner in chancery. The defendant was found guilty and sentenced to seven years' penal servitude on each count of the indictment. In State v. Ambs, 20 Mo. 214, where the indictment charged two distinct misdemeanors in different counts, and the defendant was fined upon each count, the point was made that the sentence was erroneous and could not be corrected, but the court held it proper. There is no doubt that this is the law of the state with regard to misdemeanors. As to felonies, Judge Napton said, in State v. Porter, 26 Mo. 206: "If the several counts refer to different transactions in point of fact, it is a matter of discretion with the court to compel the prosecution to elect upon which count he will proceed, and the power ought to be exercised in cases where the offenses are distinct and of a different nature, and calculated to confound the defense." Hildebrand v. The State, 5 Mo. 548; State v. Jackson, 17 Mo. 544; State v. Leonard, 22 Mo. 449. In regard to sentences, it has been said that in case of felonies separate sentences can be passed upon a prisoner only in the cases and in the manner pointed out by the statute. Wag. St. 513, § 9; *Ex parte* Myers, 44 Mo. 279. In cases of misdemeanors like the present, the jurisdiction is under the common law, and there appears to have been no question in England, since the case of Wilkes, that for similar offenses the court may sentence for several distinct terms or penalties in succession. In Wilkes' case there were distinct informations for libel, one for No. 45 of the "North Briton," and another for the "Essay on Woman;" but the sentence for both was pronounced as one sentence, and by it the term of imprisonment for the second offense was to begin at the expiration of the first term awarded upon the first offense. The punishment, however, was separately awarded to the separate offenses in the sentence; and where, as in the case at bar, the jury make separate findings and separate awards, the judgment should not lump the punishment, but should apply each penalty to its own offense. (See the authorities above cited.) Had this been done in the present case, it would have appeared upon the face of the judgment that section 2 of chapter 86 (Wag. St., p. 886), in regard to the punishment of common-law offenses, was not violated by the award of an excessive fine. Taking the verdict and the judgment, together with the information, it is obvious that this point of the appellant is not well taken. It is not claimed that there were not three distinct offenses.

It is next contended that the judgment is erroneous because it assumes to assess a further punishment, namely, hard labor in the workhouse. This, it is said, is in violation of the section last referred to. It is sufficient to say that there is nothing in the judgment or in this record showing that the defendant was sentenced to hard labor. The words are, "that he be imprisoned in the workhouse of the City of St. Louis for the term of two months," etc. We are referred to the 32d section of the act in regard to the court of criminal correction, which is to be found on page 199 of the session acts of 1869, providing for imprisonment in certain cases in the workhouse of the City of St. Louis. It is claimed that this section, or a part of it, is unconstitutional. But there are no facts before us to raise any such point, and obviously we can not go beyond the record to pass upon questions of this kind. Upon the face of the record, the only irregularity is that the judgment appears to award a fine of $150, and this is explained by the verdict. As to the place of confinement, it has been held by this court to be immaterial. *In re* Jilz, 4 Cent. L. J. 189. Even if it should be true,

then, that the legislature has no power to make local laws, adapted to peculiar situations, looking, not to the liberty or imprisonment of the citizen, but to the regulations of confinement, as to which point there is no necessity for a decision, this would not avail the appellant here.

The appellant claims that the court below erred in not granting a new trial, because, as the judge who tried the case died before the time for perfecting the bill of exceptions expired, there was no way to attain justice except by granting a new trial. The argument is that the accused had a right to an appeal; a right to a review, by the higher court, of the alleged errors of the lower court on the trial; that the rulings can be preserved only by a bill of exceptions, and that this can be allowed only by the judge who tried the case; that the death of the judge can not deprive the accused of a right which the law secured him; that, though the granting of a new trial does not procure the allowance of the bill of exceptions, it does secure the right of a review, by the appellate court, of the proceedings of the court below, and that this is the only way in which, under the circumstances, that right can be obtained. It is evident that the errors may be such as can be preserved only by a bill of exceptions, and, if the constitutional principle is to be regarded which secures an equal operation of the law as to all, a right of appeal in a criminal case can not be granted to some, while in the same class of cases it is denied to others. A bill of exceptions, generally speaking, can not be prepared without some delay, and it is common practice for counsel to take time for this purpose. The statute makes the rules of practice as to bills of exceptions in civil cases apply to trials for criminal offenses. Wag. St., p. 1105, § 26; and see State v. Marshall, 36 Mo. 400. The appellant had ten days' time granted him to file his bill of exceptions, as a part of the proceedings by which the appeal was allowed. Before this time expired, Judge Colvin became seriously ill, and ceased to perform his duty. A provisional judge was appointed on the 29th of March. On the 3d of April, when the ten days expired, the opposing counsel consented to an extension of time for filing the bill. An order of court was made accordingly, and, before this extended time had expired, Judge Colvin died. It is to the court or judge who tries the case, that the appealing party must look for the allowance of his bill. The law does not oblige him to consult the opposing counsel. It appears, in this case, that various questions as to the admission of testimony, and as to the giving of instructions, arose during the trial; and as, before the time allowed to the appellant to perfect his bill of exceptions, the judge who tried the case became incapable of action, and as it does not appear that the appellant was negligent in the matter, we think that the court below should have granted the motion for a new trial. The reasons which influenced the supreme court in their opinion in Woolfolk v. Tate, 25 Mo. 597, and Cocker v. Cocker, 56 Mo. 180, seem to apply with still stronger force to the circumstances of this case.

Accordingly the judgment of the court below will be reversed, and the case remanded. All the other judges concur.

DURING a trial, last month, in an English court, the jury were locked up all night. On coming into court the next morning, the learned judge expressed to them his regret that he had been obliged to lock them up, and said that it seemed strange that this obligation should exist while he was able to permit the prisoner to go out on bail. Those interested in the matter should, he thought, look into it, and determine whether some discretion should not be given to the judge to permit the jury to go to their homes when a case of felony lasted over one day.

COVENANT TO RENEW IN LEASE — SPECIFIC EXECUTION WHERE RENTAL TO BE FIXED BY ARBITRATION.

TSCHEIDER *ET AL.* v. BIDDLE.

United States Circuit Court, Eastern District of Missouri, March Term, 1877.

Before HON. JOHN F. DILLON, Circuit Judge, and HON. SAMUEL TREAT, District Judge.

A lease of certain real property in St. Louis was made for ten years with a covenant by the lessor for periodical renewals extending through terms aggregating a period of 500 years; the amount of the rental at the end of each ten years was to be ascertained by assessors to be appointed by the parties; the lessor fraudulently sought to evade the provisions of the lease in respect to renewal; the lessee, on the faith of the covenant for renewal, had expended in buildings on the demised premises $113,000;—the lessor sued the lessee at law for use and occupation,—whereupon the lessee filed this bill in equity to stay the action at law until the lessor appointed an assessor as required by the lease; *held*, that a general demurrer to the bill should be disallowed; and the lessee being willing to comply with the lease as to renewal, the court entered an order staying the proceedings at law, until the lessor should appoint an impartial assessor to make the valuation, reserving the right to discharge or modify the order as justice might require.

Catherine Biddle brought an action at law in this court against Peter Tscheider *et al.*, for use and occupation. In her petition she simply alleges, that she is the owner of a certain lot of ground (describing it); that Peter Tscheider *et al.* had occupied said lot of ground during one year with her permission; that the value of the occupation of such premises was worth the sum of —— dollars; that Peter Tscheider *et al.*, the occupants, are bound in law to pay her that amount for such occupation, and therefore she prays judgment. In defense to that action Peter Tscheider *et al.* set up, as a bar to the action, a clause in an original lease for ten years, dated the 28th day of May, 1864, between Catherine Biddle and Peter Tscheider *et al.*, that within the last quarter of said term of ten years the said Catherine Biddle, lessor, and the said Tscheider *et al.*, lessees, should appoint two assessors —one each—who should proceed to ascertain the value of the said lot of ground, as a naked lot, without reference to the improvements; and, after having ascertained the true and fair market valuation of said lot, they should fix and agree upon the rent which should be paid by the lessees for another term of ten years—which rent, however, should not be less than six per cent. upon the value of the property, so ascertained; that, after the said assessors had so agreed upon the amount of the rental of said property, then Catherine Biddle should execute to the said lessees another lease of the lot for ten years, at the rental so fixed by the assessors. If the assessors so appointed by the parties should not agree as to the valuation of the lot, or to the rent to be paid upon that valuation, then they should select a third assessor to assist them. Then, when and if these three assessors should *unanimously* agree upon the valuation of the said lot, and the rental to be paid for said lot, Catherine Biddle should execute a new lease for the said lot to said lessees for ten years at the rental so fixed, and so on for each succeeding term of ten years for the period of five hundred years. The answer then proceeds to aver that the parties have made five different attempts to have the rental of said lots fixed and determined by assessors, as provided in said original lease; that these five efforts have failed; that the failure is attributable entirely to the bad faith of Catherine Biddle, who, it is charged, appointed incompetent and prejudiced men as her assessors, and

instructed and limited them as to value, with a view of forcing upon respondents, the lessees, an extravagant valuation of said premises; that, by reason of her instructions, no agreement could be had among the assessors; that the only rent which Catherine Biddle is entitled to receive for said property is the rent which shall be fixed in the manner provided in said lease; and, as no rent has been fixed in the manner provided in said lease, Catherine Biddle could recover no rent whatever for the use and occupation of her said property, and that the suit for use and occupation should be dismissed and its progress stopped.

To this answer Catherine Biddle demurred, on the ground that it was not a sufficient or legal defense to the action. After argument the demurrer was sustained, and all that portion of the answer setting out the agreement to appoint assessors, and to grant a new lease, upon the basis of their finding, was stricken out. The case was set down regularly for hearing on the 30th day of September, 1876. On that day Peter Tscheider *et al.* filed the present bill in equity in this court, in which they set out substantially the agreement and facts set out in the answer as a bar to the action of use and occupation, and which the court held to be bad on demurrer; that no rental had been fixed in the manner provided in said agreement; that no new lease or renewal had been executed in accordance with the terms of said agreement; that the said lease was obtained for the purpose of enlarging a church edifice thereon, and erecting thereon a dwelling-house for the religious body using the church edifice; that, relying upon the covenants of the lease, the lessees have enlarged said church edifice and erected a building on the demised premises, at a cost of $113,240.27; that the complainants are ready to comply with the lease in all its parts, and have five times appointed assessors, who were disinterested, to meet assessors appointed by the lessor; but the attempts to procure a valuation failed, because the lessor appointed men as assessors, whose opinions as to valuation were previously known, and whom they had instructed or restricted not to go below a certain valuation, which was excessive and fifty per cent. more than the value of the property; that the lessor's assessors made excessive valuations accordingly, whereas the lessees' assessors made fair valuations; that the lessor has purposely and fraudulently prevented any valuation of the rental, as provided by the lease, with a view to extort an unconscionable rental from the lessees, who aver their willingness to appoint an assessor to meet one appointed by the lessor, who refuses to make such an appointment; that "defendant, Catherine Biddle, is now seeking to recover, in an action at law in this court, for use and occupation of said premises, against your orators, Peter Tscheider and Joseph Weber, an exorbitant and excessive rent. * * * They therefore pray that the further prosecution of said case of Catherine Biddle against Peter Tscheider and Joseph Weber be enjoined."

The prayer of the bill of Peter Tscheider *et al.*, as amended, is as follows: "They therefore pray that plaintiffs and defendant be required to appoint assessors, as required and contemplated by said lease, and in accordance with the terms and provisions thereof, and proceed to an ascertainment of the rental value of the premises, as in and by said lease contemplated and provided; and that defendant be ordered and directed to execute to said lessees a renewal term of said lease as therein provided, and unless she do so, and in the meantime, the further prosecution of the said case of Catherine Biddle against Peter Tscheider and Joseph Weber be enjoined, and for such other and further relief as the equity of the case may require, and to your honors may seem meet."

The cause is now before the court on the demurrer of Catherine Biddle to the bill of complaint.

E. T. Farish, for complainants; *Grover & Ellis*, for defendant.

DILLON, Circuit Judge:

On the demurrer the averments of the bill in equity are admitted on the record. The lessees obtained a lease for ten years, with the right to periodical renewals for five hundred years, the rental to be ascertained by assessors in the manner provided in the lease. The lessees have entered into possession, and, on the faith of the efficiency of the covenant to renew, have made improvements on the demised premises, costing over $100,000. At the end of ten years the lessor, instead of complying in good faith with the covenant as to renewal, acts in bad faith and fraudulently, to prevent a valuation and a renewal. Hence, no renewal has been had. The lessees are still in possession. The lessor brings an action at law in this court for the use and occupation of the premises—of the *whole* premises, and not simply of the premises aside from the improvements made by the lessees. On a demurrer to the answer at law, we held that the unexecuted provisions of the lease as to renewal, although attributable to the fault of the lessor, were no answer to the action; and this holding was in accordance with the decision of the Supreme Court of Missouri, in a case which arose under a similar lease. Finney v. City, 34 Mo. 303; and its sequel, Garnhart v. Finney, 40 Mo. 449; and see, also, Biddle v. Ramsey, 52 Mo. 153. And if, under such circumstances, the lessor can recover at law for use and occupation, he could recover the possession in ejectment if he had seen fit to adopt that remedy. The lessees being without fault, and willing to comply with the lease, what are their rights and remedies? They may, it is said, sue the lessor at law for a breach of the covenant in respect to renewal, and recover damages. This was so held in Garnhart v. Finney, *supra*, and has been adjudged in other cases. Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476. It will be observed that it is so held, although the obligation to renew does not become consummate until the valuation is fixed, and such valuation is to be ascertained by arbitrators who had never been appointed or had never acted. But, assuming that, on the facts stated in the present bill, the lessees might sue the lessor for damages—is this their only remedy? If so, it is obvious that the law is so defective as to shock the sense of justice, and that it rewards the party who fraudulently seeks to evade his obligation, at the expense of the party who has trusted the covenants of the lessor, and expended large sums of money on the faith that he would observe those covenants. If this lease contained a simple covenant to renew at a fair valuation, this covenant, it is admitted, could be specifically enforced, and the court would settle the valuation or rental to be paid. The lessee, in such a case, is not remitted to an action at law for damages, but may go into equity for a specific execution of the covenant to renew. This is settled law.

Is the right, the equity, to a renewal in these lessees any the less cogent and persuasive, because they have provided the means for ascertaining the rental on the renewal, and the lessor purposely and fraudulently thwarts the execution of those means? As an original proposition, after much reflection, I should say that it was in accordance with sound principle to hold, that if the lessor were guilty of the fraudulent conduct charged in the bill, he subjected his conscience to be laid hold of by a court of equity, who would say to him, "you have agreed to renew—the lessee has expended large sums of money on the faith of that agreement—you refuse to execute the provisions for the

fixing of the valuation by arbitrators—you can not, therefore, object if the court, with the concurrence of the lessees, proceeds to fix the valuation under the provisions of the lease." Some adjudications, however, have been made, with which it might not be easy to reconcile the view just stated. Milner v. Gery, 14 Vesey, 400; Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476.

These cases proceed upon the idea that such provisions as those in this lease, are in effect an agreement to arbitrate, and that agreements to arbitrate will not be specifically enforced in equity. I agree to the reasonableness of the doctrine, that a court of equity will not enforce a specific performance of an agreement to arbitrate. The grounds of this doctrine, and the cases in its support, are given by Mr. Justice Story in Tobey v. County of Bristol, 3 Story C. C. 800. To refuse judicially to enforce an agreement to arbitrate, occasions no injustice; for the courts remain open to the parties with better provisions for securing justice, than are possessed by arbitrators. So, where the refusal of a court to appoint, or compel the appointment of arbitrators, or substitute its judgment for the judgment of arbitrators, will occasion no injury which can not be fully and adequately redressed by an action at law, as in the ordinary case of an agreement to sell, it is entirely consistent with sound principle, for a court of equity to decline to interfere. In this view, I can agree to the actual decision on the facts of the cause of Sir Wm. Grant, the Master of the Rolls, in the leading case, Milner v. Gery, 14 Vesey, 400, without assenting to the reasoning of that great judge, that equity is absolutely disabled from interfering to compel a specific execution, unless the price of the property has been ascertained in the prescribed mode. That was the case of an agreement to sell—the parties could be placed in *statu quo*—no *mala fides* was imputed, and the failure of arbitrators to agree was not owing to bad faith;—under such circumstances, the refusal of the court to appoint its own master, to fix upon the price, can be well justified. But such a case as that made by the present bill is entirely different:—here the parties can not be put *in statu quo*,—here *mala fides* is imputed,—here a remedy at law for damages does not satisfy the covenant, or the demands of enlightened justice. It is a well-settled principle, that courts will not compel the specific execution of a mere agreement to arbitrate; but I am strongly convinced that it is erroneous to apply that principle to cases like the present, where it would result in manifest and gross injustice. The cases, somewhat like the one before us (Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476), which, while asserting that the lessees have a remedy at law, but none in equity for specific performance, deserve further consideration before assenting to their entire correctness. In Greason v. Keteltas, the refusal of the lessor to appoint arbitrators, or take steps for an appraisal, was held to subject him to liability at law for the value of the buildings, on a valuation *fixed by the court*, although the covenant was, that this valuation was to be fixed by arbitrators. If such refusal on the part of the lessor is a breach of the covenant, so as to render him liable for damages, or to pay for the improvements on a judicial valuation, why is it not such a breach of duty as to justify a court of equity, where substantial justice requires it, to compel the lessor either to make the appointment, or to make one for him, or otherwise judicially ascertain the valuation?

Where is the equity of the party who purposely and fraudulently seeks to evade the contract on his part, to insist that a valuation by arbitrators is a *sine qua non* to equitable relief? Is he not in such a case estopped to set up his own wrong and fraud in defense to the relief to which his adversary is otherwise clearly entitled? I suggest these views, that attention may be directed to this subject, and not because they are absolutely essential in this stage of the cause to support the present bill.

I admit that in specific performance the court must enforce *the* contract made by the parties, and that it can not ordinarily modify this contract, or make another and enforce that; but this sound and necessary principle does not preclude the operation of the principle of estoppel where this principle is necessary in order to do justice. Where the covenant to renew on an appraisal by third persons has, as in this case, been acted on by the lessee, and where the failure to secure a renewal will work injustice for which an action for damages is not a complete remedy, and where the lessor fraudulently thwarts the appraisal, why is he not estopped to set up the want of an appraisal, caused by himself, as a bar to appropriate equitable relief? The leading decisions from Mitchell v. Harris, 2 Ves. 129, to Scott v. Avery, 5 House of Lords Cases, 811, and Dawson v. Lord Otho Fitzgerald, 9 Law Rep. Exch. 6 (s. c. 3 Cent. L. J. 477), have been critically examined, and, when properly understood, I do not think that in their essential facts they are in conflict with the above views. And the right to some equitable relief in cases like the present is directly decided by the Supreme Court of Missouri, under a lease exactly similar to the one before us, in Biddle v. Ramsey, 52 Mo. 159, and is also recognized by the Supreme Court of Wisconsin, in the case of Hopkins v. Gilman, before cited.

In this connection it may be useful to refer to a provision in the English Common-Law Procedure Act of 1854, the 11th section whereof provides that "whenever the parties to any deed or instrument in writing, to be hereafter made or executed, or any of them, shall agree that any existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or person or persons claiming through or under him or them, shall nevertheless commence any action at law, or suit in equity, against any person or persons claiming through or under him or them, or against any person or persons claiming through or under him or them, in respect to the matters so agreed to be referred, or any of them, it shall be lawful for the court, in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance, and before plea or answer, upon being satisfied that no sufficient reason exists why such matters can not be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was, at the time of bringing such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit on such terms, as to costs and otherwise, as to such court or judge may seem fit; provided, always, that any such order may at any time afterwards be discharged or varied as justice may require." 17 and 18 Victoria, c. 125, § 11; Daniels' Chancery Practice, 4 Am. ed., vol. 2, p. 1861.

It may be true, as suggested by the defendant's counsel, that this statute had its origin in the doctrine of the cases in the English courts before referred to, which, to a large extent, nullified agreements to refer matters in dispute to arbitration; but, if so, it shows that the cases which are relied upon by the defendant's counsel were productive of such results that this enactment was deemed expedient. However it may be in England, I see no reason for the position that such a statute in this country is necessary, in order to

justify a court of equity in making, by analogy, such a rule or order as is therein provided for, when justice requires it, and no good reason exists for not making it. A rule or order will accordingly be entered in this case, staying the prosecution of the law action for rent until the further order of the court. If the law action would settle the amount of rental on a renewal, there might or would be good reason for allowing it to proceed. But it will not have that effect. Such a rule or order does not contravene the principle contended for by the defendant, that, before there can be a decree for renewal, the rental must be fixed by arbitrators, and can not be fixed by the court, since the object of the rule or order is to compel the defendant (lessor) to himself appoint the assessor who is to represent him. If he appoints an impartial person, without instructions, and he is met by an impartial person appointed by the lessee, it is probable an agreement as to the rental will be reached. The defendant is, of course, at liberty to answer the bill and contest its averments. When the answer is filed or the proofs are in, the court can discharge or vary the order here made, as justice may require. The demurrer to the bill is accordingly disallowed, and the rule or order, as above suggested, in respect to the law action, will be entered.

Treat, J., dissents.

ORDERED ACCORDINGLY.

BOOK NOTICES.

CIVIL MALPRACTICE.—A Treatise on Surgical Jurisprudence. With Chapters on Skill in Diagnosis and Treatment, Prognosis in Fractures, and on Negligence.—By MILO A. MCCLELLAND, M. D. New York: Published by Hurd & Houghton. Boston: H. O. Houghton & Company. Cambridge: The Riverside Press. 1877.

This is a work of some five hundred and fifty neatly printed pages, made up mostly of decisions and abstracts of the decisions of trial and appellate courts, many of which, the author candidly admits, "might well have been omitted." But in our opinion, it would have been a happy omission if he had neglected to compile any part of the book. It is an aggravated case of malpractice in bookmaking. And yet the book is not wholly without value. The Table of Cases shows that sixty-three cases are referred to. In many instances the opinion of the court is given in full. These cases give the book some value for those who do not have access to the reports. The original matter, of which there is fortunately but very little, is mostly trash.

M. A. L.

COMMENTARIES ON THE CRIMINAL LAW.—BY JOEL PRENTISS BISHOP. Sixth Edition. Two volumes. Boston: Little, Brown & Co. 1877.

Mr. Bishop is unquestionably the most successful American commentator or writer on criminal law. His successive volumes on Criminal Law, the present work, Criminal Procedure, treating of Pleading Evidence, and Practice in criminal cases, in two volumes, and Statutory Crimes, in one volume, when followed by his projected book on Precedents, are intended to cover, and do cover the whole domain of criminal jurisprudence. The great popularity of Mr. Bishop's works is undeniable. Edition follows edition in close succession. The favor with which they are regarded by the profession shows no abatement, but rather increase and strength. Is it deserved? Unhesitatingly, yes. They show exhaustive research, accurate study, original and independent thought. Mr. Bishop has a manner and style of his own, imitated from no one, and difficult to imitate. It spices them with the flavor of novelty and originality, and we expect to meet some agreeable surprise in expression or criticism or suggestion in almost every page, and are seldom disappointed. A distinctive feature of this author's works, to use his own language, is "that they are throughout a fresh enunciation of legal doctrine, made on a personal and full examination by the author of the original sources of the criminal law, English and American, old and modern, together." The "original sources" are, of course, the statutes and adjudications. Whoever will make a comparison of Mr. Bishop's work with the standard English treatises on criminal law—Mr. Russell's for instance—will perceive on what different principles they are constructed. The latter makes the statute the basis, and the author contents himself with an accurate and close statement of the exact points decided under the various clauses of the statute, and upon repealed or modified statutes when they throw light upon the existing statute. Of original views, or criticism or reflections, we have little or none. The merit and usefulness of such works are obvious, and their value consists in the faithful and exact reflection of the adjudications. This fulfills the plan, and satisfies the aim of their authors. Mr. Bishop's plan and purpose are more ambitious. He is more of a commentator, and less of a digester. Each mode has its advantages, and it is fortunate that the more difficult work of preparing treatises on the plan of Mr. Bishop has fallen into such competent hands as his. On a close or difficult point in criminal law we never feel satisfied, until we have seen how it is regarded by this distinguished author. The solid foundations upon which he has built are demonstrated by the exhaustive examination of and reference to the adjudged cases. In these two volumes 9514 cases are cited—affording to every inquirer, by means of the text and the notes, the data of the most minute investigation. His success and confirmed popularity justify the pride which the learned and laborious author evidently feels in his books. "Some readers," he says, "will call it vanity;" but if it be such, it is a pardonable vanity, agreeable and not at all offensive. In his characteristic way he says: "Not a single instance has ever occurred in which any judge has examined the author's original view so as to understand it, without adopting and following it. And this has been going on for more than twenty years, as uniformly as the sun has risen in the morning and set at evening. Nor has any instance ever occurred, within the author's knowledge, in which any legal person, who has taken pains to understand a position depending on juridical views which might be deemed his own, has undertaken to assail it by legal argumentation. The author does not claim abilities superior to those professed by even the humblest of our profession; but, in his own hands, the plan has been promotive of harmony in the decisions, and he mentions the fact as a tribute to truth itself." (Introd. p. XII.) We might expand this notice, but it is not necessary in relation to a work which is found in the library of almost every lawyer, and with which he would not willingly part.

D.

QUERIES AND ANSWERS.

2. HOMESTEAD—PROCEEDS OF SALE OF—EXEMPTION.—A, the owner of land, worth less than $1,000, and which is exempted as a homestead, contracts a debt, then sells his land upon time, and, removing to another county in the same state, purchases a second tract of land on credit, worth less than $1,000, which he occupies as a homestead. Can B, the creditor, subject to the payment of his debt the purchase money due A for his first tract of land, when the second tract has not been paid for? The question arises under a statute containing only the usual words, exempting from "sale under ex-

ecution, attachment, or judgment of any court, except to foreclose a mortgage given by the owner of a homestead, or for purchase money due therefor, so much land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value $1,000." I have found no direct adjudication settling the question. In the case of Thompson v. Heffner, 11 Bush, 353, the court decided that where an exchange of real estate is made, if either of the parties thereto is entitled to a homestead in the property he parted with, he will take the same right in the property he receives; and in the course of the opinion the court say: "In the exchange the exempted homestead in one paid for a like exemption in the other, and nothing was withdrawn from the creditors. If instead of exchanging our residence for another, the first had been sold and the second purchased, *the rule might be different.*" LEX.

[The question here is,whether the proceeds of the debtor's homestead, due but not payable, that is, payable at a time certain in the future, are exempt under the statute cited. The homestead being worth less than the sum limited in the statute, no judgment is a lien upon it. The homestead being exempt, everything that comes out of it is also exempt. It follows that the proceeds of sale are exempt. In Illinois, under a statute very much narrower than that given by Lex, the whole current of decided cases, without a single exception, confers upon the debtor the right to sell his homestead. If the right to sell be restricted, then his right to the enjoyment of it is not complete. See 53 Mo., 375; 57 Ib., 104; 58 Mo., 425. O. B. S.

3. HOMESTEAD — JUDGMENT AGAINST MARRIED WOMAN.—I have obtained judgment against the separate estate of a married woman. The husband is insolvent, and the wife owns in her separate right the dwelling-house in which she resides, and no other property. Can she claim the property exempt as a homestead, so as to defeat the judgment against her separate estate? C.

[The property is certainly exempt, if it was her homestead at the time she contracted the debt. If it were her husband's property, and occupied by his family as a homestead, it would be exempt; the rule must be the same where it is the wife's, and she is the debtor; the family is hers. Young v. Graff, 28 Ill., 20; Tourville v. Pierson, 39 Ib., 446. Under the law of this State, all judgments against a married woman, except such as are upon proceedings *in equity*, are, as against her, invalid —not even attachment, where she is an absconding debtor, is valid. Gage v. Gates, 62 Mo., 412. O. B. S.

RECENT LEGISLATION.

MISSOURI LEGISLATURE—SESSION OF 1877.

AN ACT to amend section two (2) of an act entitled "An Act providing for the vacating of streets, alleys, public squares and grounds of towns and cities, and providing for the change of names of such towns and cities," approved January 30th, 1866.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. That section two of an act entitled "An Act providing for the vacating of streets, alleys, public squares and grounds of towns and cities, and providing for the change of names of such towns and cities," approved January 30th, 1866, is hereby amended to read as follows: Section 2. If no opposition be made to such petition, the County Court may vacate the same with such restrictions as they may deem for the public good; but if opposition be made, such application shall continue until the next term of the court, when, if the objector consent to such vacation, or if two-thirds of all the real-estate holders of the town or city petition therefor, the court may grant the prayer of the petition. The part so vacated, if it be a lot, shall vest in him who may have the title thereof, according to law; and if the same be a street or alley, the same shall be attached to the ground bordering on such street or alley, and all title thereto shall vest in the persons owning the property on each side thereof in equal proportions, according to the length or breadth of such ground, as the same may border on such street or alley; and whenever a public square or common shall be vacated, the property thereof shall be disposed of in such manner as the proper authorities of said town or city may direct.

Approved March 16th, 1877.

AN ACT to establish a schedule of fees for the office of Register of Lands.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The Register of Lands shall charge for performing the services hereinafter specified the following fees, to wit:

For plat of survey,	$1.00
For plat of township,	2.50
For copy of field notes, for every one hundred words and figures,	.15
For abstract of lands, for the first fifty tracts or less, for each tract	.05
For abstracts of lands, for each tract over fifty tracts,	.03
For copy of any record or other paper or document on file in his office, for each one hundred words and figures,	.10
For each certificate to any abstract or copy of any record or other paper, attested by his official seal,	.50
For each township plat, ordered by any county court for the use of the county,	2.00

SEC. 2. The fees for such services shall be paid in advance, and it shall be the duty of the Register of Lands to pay the same into the State Treasury on the last day of each month, and take duplicate receipts therefor from the Treasurer, one of which shall be filed in his office, the other to be filed with the State Auditor, who shall charge the Treasurer with the amount thereof, to the credit of the revenue fund.

SEC. 3. The Register of Lands shall keep an account of all such fees received by him, in a book to be provided for that purpose, called the "Register of Fees," which shall be open at all times to inspection by the public.

SEC. 4. An emergency exists for the taking effect and going into force of this act immediately, the emergency being that there is now no law in force regulating the fees of the office of Register of Lands; therefore this act shall take effect and be in force from and after its passage.

Approved March 16th, 1877.

AN ACT to amend an act entitled "An Act for the incorporation of insurance companies other than life insurance companies, and for the regulation of insurance business, other than life assurance business, approved March 4th, 1869," being article 3, chapter 76 of Wagner's Missouri Statutes.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. That section 2 of the act entitled "An Act for the incorporation of insurance companies other than life insurance companies, and for the regulation of insurance business other than life assurance business," approved March 4th, 1869, being art. 3, ch. 76, of Wagner's

Missouri Statutes, be, and the same is hereby amended by adding thereto words as follows, to wit: "But any mutual company, upon a majority vote of its members present at an annual meeting, or at any special meeting called for that purpose, after one week's notice by advertisement in one or more newspapers printed and published in the county, where the chief office of said company is located, may charge and receive, for the mutual benefit of its policy-holders, cash in payment of premiums on such of its policies as shall be by a majority vote at any such meeting determined upon;" so that section 2 shall read as follows, to wit: Section 2. Corporations may be formed for the purpose of doing the business mentioned in the first of the three classes or divisions named in the first section of this act, either on the stock or mutual plan, and for the purpose of doing the business mentioned in the second and third classes or divisions upon the stock plan; and the names of every corporation so formed shall indicate the plan upon which it is formed, by having the words "stock" or "mutual," as the case may be, affixed to the name which it assumes; and it shall be unlawful for any corporation so formed, to do business on any other plan than that upon which it is organized, or in any manner to use its name, or to make publication thereof, unless the words herein provided be affixed thereto, in plain letters, of at least half the size of the letters in which the balance of the name is printed; and no such corporation shall adopt the name of any existing company or association transacting the same kind of business, or a name so similar as to be calculated to mislead the public; and mutual companies shall not issue policies known as "stock policies," or do business as joint stock companies, or upon the joint stock plan; but any mutual company, upon a majority vote of its members present at an annual meeting, or at any special meeting called for that purpose, after one week's notice by advertisement in one or more newspapers printed and published in the county where the chief office of said company is located, may charge and receive, for the mutual benefit of all its policy-holders, cash in payment of premiums on such of its policies as shall be by a majority vote at any such meeting determined upon.

SEC. 2. That section 17 of said act be, and the same is hereby amended, by inserting after the words "every person who shall insure in such mutual company" the following words, to wit: "Whose premium is payable by note;" so that said section 17 so amended shall read as follows, to wit: Section 17. Every person who shall insure in such mutual company, whose premium is payable by note, shall, before he receives his policy, deposit with the company a note for such sum or sums of money as may be agreed upon for the premium, a part not less than ten per cent. of which shall be immediately paid in cash, before the company shall be liable for any loss; and the remainder of said note shall be made payable at any time, and in part or the whole, as the directors of said company may demand, upon an assessment to be made by them, whenever they shall deem the same necessary for the payment of losses, expenses and other liabilities of said company. Said note or such part thereof as shall remain unpaid at the expiration or termination of the policy, shall be given up to the maker of the same, *Provided*, all assessments upon such note, and all liabilities of said maker to the company shall have been paid. All buildings and other property, real and personal, insured by and with such company, together with all rights, title and interest of the insured to the lands on which such buildings are situated, shall be pledged to such company, and the company shall have a lien thereon until the aforesaid note is fully paid; *Provided*, that the maker of said note shall assent to such lien, in writing, upon the face of the same, and the note shall be recorded in the office of the recorder of the county where such property is situated.

Approved March 15th, 1877.

THIRTIETH GENERAL ASSEMBLY OF ILLINOIS.

AN ACT to repeal an act entitled "An act to establish a Recorder's Court in the City of El Paso," approved March 6th, 1869, and to repeal an act entitled "An act supplemental to an act entitled 'An Act to establish a Recorder's Court in the City of El Paso,' approved March 6th, 1869, and to provide for the turning over to the Circuit Court of Woodford County of the records, books, dockets, files and papers of the said Recorder's Court of the City of El Paso, and to authorize and empower the Circuit Court of Woodford County, to make all orders necessary to carry into effect all judgments, orders, and decrees of said Recorder's Court, and to authorize the Clerk of the Circuit Court of Woodford County to issue all necessary process to carry into effect all unsatisfied judgments, and decress of said Recorder's Court.

SEC. 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly*, That an act entitled "An Act to establish a Recorder's Court in the City of El Paso," approved March 6th, 1869, and an act supplemental thereto, entitled "An Act supplemental to an act entitled 'An Act to establish a Recorder's Court in the City of El Paso,' approved March 6th, 1869," be and the same are each hereby repealed.

SEC. 2. All records, dockets, files, books and papers belonging or appertaining to said Recorder's Court of the City of El Paso, shall be by the clerk thereof transferred and turned over to the Clerk of the Circuit Court of Woodford County, and the Clerk of said Circuit Court of Woodford County is hereby authorized and empowered to demand and receive of the clerk of said Recorder's Court of the City of El Paso, all such records, dockets, files, books and papers, and the same shall be kept by said Circuit Clerk as the records, dockets, files, books and papers in his office, and said Clerk shall issue all process necessary to carry into effect all unsatisfied judgments and decrees of said Recorder's Court; and the Circuit Court of Woodford County is hereby empowered and authorized to make all orders necessary to carry into effect all judgments, orders and decrees of said Recorder's Court in the same manner and with the same power and effect as if said judgments, orders, and decrees had been originally entered or rendered in said Circuit Court.

SEC. 3. An emergency is hereby declared to exist, and therefore this act shall take effect and be in force from and after its passage.

Approved March 26th, 1877.

AN ACT to amend an act entitled "An Act to provide for the Incorporation of Cities and Villages," approved April 10, 1872, in force July 1, 1872.

SEC. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That section 2 of article 4 of an act of the General Assembly of the State of Illinois, entitled "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, be and the same is hereby amended so that it shall read as follows: SEC. 2. At the general election held in 1877, and biennially thereafter, a mayor, a city clerk, a city attorney, and a city treasurer shall be elected in each city: *Provided*, That no person shall be elected to the office of city treasurer for two terms in succession."

SEC. 2. Whereas, an emergency exists, which makes it necessary that this act shall take effect on or before the third Tuesday of April, A. D. 1877, therefore this act shall be in force from and after its passage.

Approved March 26th, 1877.

AN ACT to amend Section 1 of Article 4 of an act

entitled "An Act to provide for the Incorporation of Cities and Villages," approved April 10th, 1872.

SEC. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That section 1 of article 4 of an act entitled "An act to provide for the incorporation of cities and villages," approved April 10th, 1872, be and the same is hereby amended, so that hereafter it shall read as follows: SEC. 1. A general election for city officers shall be held on the third Tuesday of April of each year: *Provided*, that in cities which include wholly within their corporate limits a town or towns, such elections shall be held on the first Tuesday of April.

SEC. 2. Whereas an emergency exists by means of the happening of town elections in April, 1877, this act shall take effect and be in force from and after its passage.

Approved March 9th, 1877.

NOTES OF RECENT DECISIONS.

NEGLIGENCE—KEEPING FEROCIOUS DOG—ACTION FOR DAMAGES—EVIDENCE.—*Mann v. Wieand.* Supreme Court of Pennsylvania, 34 Leg. Int. 77. Opinion by MERCUR, J. The defendant was charged with wrongfully and negligently keeping dogs of a ferocious and mischievous nature. It was averred that he knew they were used and accustomed to attack, worry, and frighten horses as they were driven on the public highway, near his dwelling-house, and by the dogs' repetition of such an act, the injury complained of was caused. To fasten the liability on him, it was necessary to establish the vicious character of the dogs, and his previous knowledge of that character. To prove the former, the defendant in error gave evidence of the conduct of the dogs on two occasions. At one time, as a team was passing along on the public highway, the dogs, without leaving the enclosure of their master, jumped against the bars of the fence at the roadside with such force and violence, and rattled them to such an extent, as to frighten the horses, thereby causing them to break the double-tree, and run for several rods. The other act was of a more vicious character. As a team was passing the premises of the plaintiff in error, his dogs ran out into the road, one of them barked and jumped ahead of the horse so as to stop it. The other raised himself up, put his paws on the wagon, barked and growled, and seized the shawl of a small girl who sat on the back seat. On its being jerked loose from him, he got down, but both dogs, growling, followed the team some three or four hundred rods. There was evidence that the plaintiff in error had notice, before the injury in this case, of the conduct of the dogs on both those occasions. *Held*, that these facts were sufficient upon which to find the dogs to be vicious and accustomed to attack and frighten horses. In Smith v. Pelah, 2 Strange, 1264, it was said by Lee, C. J.: "If a dog has once bit a man, and the owner, having notice thereof, keeps the dog and lets him go about or lie at his door, an action will lie against him, at the suit of a person who is bit, though it happened by such persons treading on the dog's toes; for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered." So in Arnold v. Norton, 25 Conn. 92, it was held that full and satisfactory proof of a single instance in which the dog had previously bitten a human being, and of the owner's knowledge thereof, was sufficient; but that the force of such testimony would depend much on the surrounding circumstances. In Kittridge v. Elliott, 16 N. H. 77, evidence of notice of one attack by a dog was held sufficient to charge the owner with all its subsequent acts. In Loomis v. Terry, 17 Wend. 496, one instance seems to have been considered sufficient. One attempt of a bull to gore was held sufficient in Cockerham v. Nixon, 11 Iredell, 269. One instance may be such unmistakable evidence of a vicious propensity as to make the owner of the dog, with notice, liable for any subsequent act of a similar character. The *gist* of the action for the subsequent misconduct of the dog, is for keeping it after knowledge of its vicious propensity; May v. Burdett, 9 Q. B. 101; Wheeler v. Grant, 23 Barb. 324. It thereupon becomes the duty of the owner to so keep his dog as to guard against a repetition of similar misconduct. He is bound to secure it at all events, and is liable to parties afterwards injured, if the mode he has adopted to secure it proves insufficient. Wood on Nuisances, § 763; Jones v. Perry, 2 Esp. 482; Mason v. Kirling, 12 Mod. 332. The principle on which this rule rests was held in Munn v. Reed, 4 Allen, 431, to be that a ferocious animal, liable to do injury to men or property, is a nuisance, and that keeping it after notice of such liability is so wrongful, that the owner is chargeable for any neglect to keep it with such care that it can not do any damage to any person who, without any essential fault, is injured thereby. The same rule applies with reference to injuries from vicious dogs as in reference to other nuisances. Wood on Nuisances, § 766; Fish v. Skut, 21 Barb. 333; Hewes v. McNamara, 106 Mass. 281; Marsh v. Jones, 21 Vt. 378. Hence the keeping of a vicious dog near a public highway, endangering the safety of persons passing thereon, is a nuisance operating as an obstruction, and renders the persons, knowingly keeping it there, liable to indictment, and also liable to an action in favor of any person injured thereby. Granger v. Findley, 7 Irish C. L. Rep. 417; Wood on Nuisances, § 768. It is said in § 803, *Ib.*, knowledge of the owner, that his dog had attacked animals of one class, is not evidence from which knowledge may be inferred that it would attack animals of another class, nor that it would attack mankind. But in Shearman and Redfield on Negligence, the rule is declared to be: "It is not necessary that the acts of aggression brought to the notice of the owner should be precisely similar to that on which the action against him is founded, but they should indicate a disposition to commit injuries substantially like those which form the basis of the cause of action." This is believed to be the true rule in its application to domestic animals. The defendant having proved the fact that the dogs had worried and frightened passing horses, from which a propensity to do so may be inferred, evidence is not admissible to prove their good behavior at other times. This very question arose in Buckley v. Leonard, 4 Denio, 500, where the owner of a dog which had bitten other persons had notice of the fact, and had suffered him to be at large, when he bit plaintiff. It was held to be no answer to the action that the dog was generally inoffensive.

RINGING CHURCH BELLS IN CITY—NUISANCE—INJUNCTION.—*Harrison et al. v. St. Mark's Church.* Common Pleas, of Philadelphia, 3 Weekly Notes, 384. Opinion by HARE, P. J. 1. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents of the neighborhood in their homes and occupations, is a nuisance, and will be enjoined. 2. As the atmosphere can not rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing.—In this case a bill was filed by the owners and occupants of dwelling houses in the vicinity of the defendant church, to restrain the ringing of its bells.

The bill alleged that the defendants had, in the tower of the church, four large bells, and had caused them to be rung "regularly before each and every service, on each and every day of the week, the strokes averaging between seventy-five and ninety-four a minute, and prolonged continuously for a period of between ten minutes and half an hour at each of such times—that is to say, on Sundays, before early service, at 7 o'clock A. M., for fifteen minutes; and before each of the three other Sunday services, at 10:30 A. M., 4 and 7:30 P. M., for half an hour; on week-days, before daily services, at 9 A. M. and 5 P. M., for between ten and fifteen minutes; and on festivals and saints'-days to announce still additional services; that, in response to a special appeal by a physician, in behalf of an ill patient, the early Sunday morning ringing had been *temporarily* discontinued; that the noise of such ringing was harsh, loud, high, sharp, clanging, discordant, producing a nuisance which disturbed rest and sleep, distracted the mind from any serious employment, interfered with conversation in the immediate neighborhood, lessened or destroyed social and domestic intercourse, peace and happiness; and, in particular, was detrimental to the health and comfort of invalids, children, and persons whose nervous systems are delicately organized; that the effect was not limited to the periods of actual ringing, but the anticipation of its beginning produced a nervousness and excitement which to all is painful, and to some intolerable; and, that such nuisance affected injuriously the value of complainants' property." The bill further averred that, prior to the institution of the suit, frequent appeals had been made to the vestry to discontinue or reduce the ringing, but that, in response, the vestry had passed a resolution in which they "utterly denied the right of the residents in the vicinity to regulate in any way the manner or the time of ringing the bells"—stating, however, that they would always be ready, through the Rector, "to hear and consider any special appeal that may be made for stopping the ringing of the bells in any special case of illness." To the bill the defendants filed an answer, setting up that the "chiming complained of is neither a public nor private nuisance, being in truth and fact musical, mellow, soft, well-pitched, sweet, and harmonious, and of such an agreeable character that it has grown to constitute one of the chief attractions of the neighborhood;" that the bells were of the best material and tone; that bell-ringing "is part of the ordinary and usual sounds of city life, the chiming complained of being far less calculated to disturb ordinary citizens than the customary bell-ringing in factories, schools, and some other churches, or the noises of cars, wagons, steam-whistles, and other sounds incident to a city;" and that the "chiming of bells is in accordance with the ancient modes of announcing divine worship in the christian churches throughout the civilized world, for more than 1,200 years, and so practiced in this city for more than a century." Several hundred affidavits and counter-affidavits were produced in support of the allegations of the bill and answer. They covered a wide field, and were classified as clerical and theological, medical and physiological, scientific, expert, relating to the value of real estate, the effect of the bells upon the numerous affiants, invalids, etc., etc. On all these points the testimony was conflicting. Different members of the same household gave affidavits of an opposite tenor, and several persons who originally gave affidavits on one side subsequently gave counter-affidavits on the other. On behalf of the complainants, there was positive testimony, however, that the bell-ringing had caused loss of sleep and annoyance to some of the complainants, and had produced bad effects on certain invalids. On the other hand very many witnesses for the defendant testified that, so far from the bells being a nuisance, they greatly enjoyed the sweet sounds, and would miss them very much if they were stopped. The questions were argued before the court at great length, the complainants relying mainly on the cases of Martin v. Nutkin, 2 P. Wms. 266, and Soltau v. DeHeld, 2 Simons, N. R. 133; S. C., 9 Eng. Law & Eq. Rep. 104. (A. D. 1851). Upon the first branch of the case, as to the annoyance and suffering caused to the neighbors, the court decided, that the weight of testimony was in favor of the complainants. The next inquiry was, whether, regarding the defendants' acts as prejudicial, they were done in pursuance of a right which could not be questioned. Upon this point, the court said: "The rule, *sic utere tuo ut alienum non lædas*, is not of universal application, and it has been said, 'that there are many cases in which a man may lawfully use his own property so as to cause damage to his neighbor, if it be not *damnum injuriosum*.' Acton v. Blundell, 12 M. & W. 324, 341. Where no contract, custom, or statutory rule prohibits, one may dig a trench on his own land, although the effect is to render the adjacent land incapable of sustaining a wall or house which has been built on it; but it also seems that 'if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his soil, so as to occasion mine to fall in, he may be liable to an action.' Wyatt v. Harrison, 3 B. & Ad. 71; Humphries v. Brogden, 15 Q. B. 739, 744; Harris v. Ryding, 5 M. & W. 60; Wakefield v. Buccleuch, 4 Eq. Cases L. R. 613. However this may be, and whether damage occasioned by the exercise of an absolute or exclusive right be, or be not, a cause of action, it is clear that rights which others share should be exercised with a due regard for their interest. A man may do ordinarily what he will with his ground, but he has no such dominion over the streams that pass through, or the air that floats over it. The air and water are so far common property; that no one can be entitled to do that which will render them a source of injury, or unfit for the general use. As the atmosphere can not rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the not less delicate sense of hearing. Light may be shut out, and odors measurably excluded, but sound is all pervading. What, then, it may be asked, is bell-ringing forbidden? The answer is, certainly not, unless the circumstances require it. It does not, as I suppose, enter into the imagination of any man, and certainly can never be the purpose of a court, to suppress the chimes which, properly attuned and regulated, are a melodious and grateful form of sacred music. But, while bell-ringing may be a fruitful source of good, it may also be practiced in a way to produce injurious consequences." An injunction was thereupon granted, "restraining the defendants from ringing the bells of St. Mark's Church, or otherwise using the same so as to cause nuisance or annoyance, by sound or noise, to the complainants, or any of them, within their respective houses."

CONVERSION OF PROPERTY BY AGENT—WHEN LIABLE IN TROVER.—*Laverty v. Snethan.* New York Court of Appeals. 11 N. Y. Daily Register, 529. Opinion by CHURCH, C. J. If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. The defendant received a promissory note from the plaintiff, made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was

received for negotiation, and the note to be returned the next day, or the avails thereof. The plaintiff testified in substance, that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use. *Held*, that the act of the defendant in delivering the note and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The question, as to when an agent is liable in trover for conversion, is sometimes difficult. The more usual liability of an agent to the principal is in an action of assumpsit, or, what was formerly termed an action on the case for neglect or misconduct; but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. A constructive conversion takes place, when a person does such acts in reference to the goods of another as amount in law to an appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. Bouv. Law Dict., title Conversion. Savage, C. J., in Spencer v. Blackman, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods." In this case, the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury) not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property, which resulted in loss; and that interference and disposition constituted, within the general principle referred to, a conversion, and the authorities sustain this conclusion by a decided weight of adjudication. A leading case is Syeds v. Hay, 4 T. R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. Buller, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this state as good law, and has never, to my knowledge, been disapproved, although it has been distinguished from another class of cases, upon which the defendant relies, and which will be hereafter noticed. In Spencer v. Blackman, 9 Wend. 167, a watch was delivered to the defendant, to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution not against the owner, and it was held to be a conversion. Savage, C. J., said: "The watch was intrusted to him for a special purpose—to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. Wheelock v. Wheelwright, 5 Mass. 103. So, when a factor in Buffalo was directed to sell wheat at a specified price, on a particular day, or ship it to New York, and he did not sell or ship it that day, but sold it the next day at the price named; *held*, that in legal effect it was a conversion. Scott v. Rogers, 31 N. Y. 676; see, also, Addison on Torts, 310, and cases there cited. The cases most strongly relied upon by the learned counsel for the appellant, are Dufresne v. Hutchinson, 3 Taunt. 117, and Sargeant v. Blunt, 16 J. R. 73, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property; a distinction which, in a practical sense, may seem technical; but it is founded, probably, upon the distinction between an authorized interference with the property itself and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case, Spencer, J., distinguished it from Syeds v. Hay, *supra*. He said: "In the case of Syeds v. Hay, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf." The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action; but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally there might be a difference; but in law, both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. Palmer v. Jarmain, 2 M. & W. 282, is plainly distinguishable. There the agent was authorized to get the note discounted, which he did, and appropriated the avails. Parke, B., said: "The defendant did nothing with the bill which he was not authorized to do." So in Cairns v. Bleecker, 12 T. R. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the securioy was a matter of judgment. In McMorris v. Simpson, 21 Wend. 610, Bronson, J., lays down the general rule that the action of trover "may be maintained wherever the agent has wrongfully converted the property of his principal to his own use, and the act of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor."

IN AN English Assize Court, recently, the judge sentenced a man to a month's imprisonment for stealing some hay, valued at a few dollars. After the prisoner had been removed, a juryman remarked: "That's rather stiff, my lord," and, as all the jury agreed in this opinion, the judge asked what sentence they would suggest. "Cut it in halves, my lord," said a juryman. "Very well, gentlemen," said the judge, "it was your verdict and it shall be your sentence." The prisoner was accordingly brought back into court, and the judge said to him: "The jury think that a month is too stiff; take fourteen days."

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

MECHANIC'S LIEN—INTEREST IN LAND TO WHICH LINE ATTACHES.—Furnishing materials for the erection of a building, gives to the material-man a lien upon the building for the value of the materials. Such lien extends to whatever interest the party erecting the building may have in the land, whether it be legal or equitable, and in answer to a suit to enforce a mechanic's lien in such case, defendant will not be heard to deny his title, as it is an immaterial issue. [Citing Wag. Stat. p. 907, § 1; Williams v. Webb, 2 Disney, (Cin.) 430; Falconer v. Frazier, 7 Sm. & Marsh. 243]. Nothing can be affected by the judgment, except the interest of parties to the record. If any of these parties have no interest in the land, the judgment so far confers no lien. Judgment affirmed. Opinion by BAKEWELL, J. —*Fleitz v. Vickey.*

PRACTICE—APPEALS FROM JUSTICES' COURTS—AMENDMENTS—SERVICE IN WRONG NAME—APPEARANCE FOR PURPOSE OF APPEAL—NOTICE OF AMENDMENT.—A judgment by default will not be set aside because the attorney of the party in default was negligent in his business, and neglected the case. It is not error for the Circuit Court to permit a correction of the name of defendant, appellant from the judgment of a justice of the peace, in the account, so as to make it correspond with the name signed to the appeal bond. Such correction or amendment of the account can be made, without the notice to the opposite party required by § 29, chap. 165 of the General Statutes, when pleadings are amended. Where the return of the constable shows that defendant was served by a wrong name, and subsequently approved for the purpose of appeal, and gave his right name, judgment was properly entered against him in the Circuit Court by the name he calls himself. The plaintiff may be allowed to withdraw a copy of the bond sued on, and file the original. Judgment affirmed. Opinion by BAKEWELL, J.—*Murphy v. Lem.*

CONSTRUCTION OF CONTRACTS—BILLS OF LADING—INSTRUCTIONS—BURDEN OF PROOF—CHANGE OF OWNERSHIP OF GOODS CONSIGNED—PROPER PARTIES TO ACTION. —Where bills of lading show an undertaking by a common carrier to convey freight to N, there to be delivered to B or order, and in the tabular statement of "Marks" by which the freight is to be identified, the name of B is followed by A, as his address, the import of such bills of lading would be a contract to transport the freight to N and not to A. Where one of the counts of a petition sets up a contract to transport freight to a certain destination, and that there was shipment under such contract, and a failure to deliver the freight, and there was evidence tending to prove such allegations, it was error in the Circuit Court to refuse an instruction for plaintiff, that if the jury believed the facts as stated, the burden of proof was on defendant to show that the freight was delivered at its agreed destination; and if defendant failed to prove such delivery, plaintiff was entitled to recover the value of the freight as shown by the evidence. When a consignor sells the goods shipped to his consignee, this would bar a recovery by the consignor; but not where he merely offered to sell, which offer was rejected by consignee, who also refused to accept drafts drawn against the consignment. Judgment reversed Opinion by LEWIS, C. J.—*Wheeler v. St. L. & S. E. R. R. Co.*

LIBEL—PUBLICATION OF COURT PROCEEDINGS PRIVILEGED—PUBLISHING CONTENTS OF PAPERS FILED—ACTIONABLE WORDS.—Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings be *ex parte* or otherwise. The reason of the rule is the importance of giving publicity to judicial proceedings, which is supposed to overbalance the inconvenience to individuals. [Citing, Curry v. Walter, 1 Esp. 456; Davison v. Duncan 7 E. & B. 231; Ryalls v. Leader, Law Rep. 1 Ex. 299; Lewis v. Levy, E. B. & E. 537; Pinero v. Goodlake, 15 L. J, (N. S.) 676; Mason v. Walter, 4 Q. B. Law Rep. 93.] The privilege is not extended to the publication of the one-sided statements of a petition for divorce before trial. [Citing Ackerman v. Jones, 37 N. Y. Sup. Ct., 43]. The present publication is not within the rule of privileged publications, as it purports to give the contents of a petition for divorce which had never been brought before the court with a view to judicial action. The statements were of a kind calculated to degrade plaintiff in the estimation of the community, and impute an act which may be a crime under the statutes. *Prima facie* the words are actionable [citing Wag. Stat. 519, § 1; Steeber v. Wensel, 19 Mo. 513]; their use implies malice, i. e. wrongful intent, which the law presumes to be the concomitant of an act which it condemns as wrong. The fact that the event transpired long before the publication will not render such publication libelous. The question of malice was for the jury. The second instruction took this question from the jury. Judgment reversed. Opinion by HAYDEN, J.—*Barber v. St. Louis Dispatch Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, } Associate Justices.
" WARWICK HOUGH, }
" E. H. NORTON, }
" JOHN W. HENRY, }

NEGLIGENCE—DEFECT IN RAILWAY TRACK.—Gibson v. Pac. R. R. Co., 46 Mo. 167; Devitt v. Mo. P. R. R., 50 Mo. 305; Cummings v. Collins, 61 Mo. 522, cited and approved by the court. In an action by a fireman against the railroad company for injuries received by overturning the engine, (which accident was caused by a defect in the track), there is no presumption of law or of fact that the plaintiff knew the unsafe condition of the track, and waived the same by continuing in the service of the company, although he had passed over it twice daily for four months. It was not a fireman's business to inspect the track, and instructions on this point framed on the opinion of the court in Gibson v. P. R. R., are held to be a correct statement of the law. Opinion by NAPTON, J.—*Dale v. St. Louis, K. C. & N. R. R.*

INSOLVENCY OF CORPORATION—LIABILITY OF STOCKHOLDERS.—Admitted insolvency of a corporation is such a dissolution as will authorize a suit against the stockholders under the statute. 52 Mo. Rep. 587. As to the liability of a stockholder, sec. 20, Chap. 62, p. 330, the rule laid down by this court (Perry *et al.* v. Turner *et al.*, 55 Mo. 424), is affirmed. In an action against a stockholder, an answer that another creditor had sued the stockholder, and obtained judgment, execution and payment to the full amount of the liability of the stockholder, is a good plea in bar, although the suit in which the judgment was rendered was begun *after* that in which the answer was made. There is nothing in our law which gives any lien or priority to the creditor who first sues, and proceedings against a stockholder rest on the same ground with all other actions in which no special lien is given by statute. The first judgment gives the prior lien on real estate, and the first levy gives it on personal property. Opinion by NAPTON, J. —*State Savings Association v. Kellogg.*

EJECTMENT—ESTOPPEL IN PAIS—STATUTE OF FRAUDS. —Where a disputed or uncertain boundary line between contiguous proprietors has been conclusively settled by parol agreement, ejectment may be maintained for all the land included within the calls of the deed as located and determined by the agreement and conduct of the parties fixing the boundaries. Spears v. Walker, 1 Head, (Tenn.) 166; Tarrant v. Terry, 1 Bay, (S. C.) 239. To such cases the statute of frauds does not apply, because in them there has been no sale of land to either party; no consideration has passed from one to the other, nor is there any contract for the sale of land from one to the other. Taylor v. Zepp, 14 Mo. 482; Blair v. Smith, 16 Mo. 273. Acquiescence in the boundary lines so agreed upon is evidence to go to the jury to show an express agreement as to the lines, and if continued for a great number of years, is conclusive evidence. Jackson v. McConnell, 19 Wend. 176; Taylor v. Zepp, and Blair v. Smith, *supra*. And the right to maintain ejectment in this class of cases rests upon the ground that the acts of the parties constitute an estoppel *in pais*. Taylor v. Zepp,

and Blair v. Smith, *supra*; Vosburgh v. Teator *et al.*, 32 N. Y. 568; Baldwin v. Brown, 16 N. Y. 363; Boyd v. Graves, 4 Wheat. 512; Heirs of Houston v. Mathews, 1 Yerg. 118; Lewallen v. Overton, 9 Hump. 76. Where land is vacant, the constructive possession followed the true title, and possession taken under a writ *habere facias possessionem* issued against persons in possession who do not claim under the holders of the true title is good only while it is an actual possession; and in case of a subsequent vacancy there can be no constructive possession in favor of those claiming under the writ as against the owner of the title. Opinion by HOUGH, J.—*Turner v. Baker et al.*

NOTE by the Reporter.—In this case the court appears to be considerably exercised by the consideration of the doctrine of estoppel *in pais*, and the statute of frauds, as applied to cases in which the title papers call for certain boundary lines between the lands of contiguous owners, while the acts of the parties clearly indicate that they had agreed upon boundary lines different from those given in the deeds. Is not the solution of the difficulty found in the well-known principle that *executed agreements are not within the statute of frauds*, and that, the acts of the parties being evidence (*Quaere*, conclusive evidence?), of such an agreement, the same is valid *because* executed without reference to the doctrine of estoppel *in pais* at all?]

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE, } Associate Justices.
" W. B. RODMAN, }
" W. P. BYNUM, }
" W. T. FAIRCLOTH, }

LIABILITY OF COUNTY — BOARD OF JURY — WITNESS FEES.—A county is not liable for the board of a jury in a capital case, during the pendency of the trial. A witness in a criminal action has no claim upon the county, until the liability of the county for the costs is passed upon by the court.— *Young v. Commissioners of Buncombe.*

WHEN A GRANT IS FOR A PARTICULAR PURPOSE only, the conversion to another and different use is forbidden by a necessary implication. So, where the law prescribes that "all the real estate held by the North Carolina Railroad Company for right of way, for station places, of whatever kind, and for workshop locations, shall be exempt from taxation," etc: *Held*, that such exemption covers only such real estate as is actually held and used for the purposes expressed.—*R. & D. R. R. Co. v. Commissioners of Alamance.*

POWERS OF COUNTY COMMISSIONERS—LEVY OF TAX—PERSONAL CREDIT.—The statute (Battle's Revisal, chapter 27, section 8), enumerating the duties and powers of county commissioners, makes no grade among them, and gives no preference to one over another. A court has no power to interfere with the domestic administration of the affairs of a county, so long as the board of commissioners act *intra vires; therefore*, where it was alleged that a board of commissioners had not levied a sufficient tax to defray the ordinary expenses of the county, including the support of the poor, on account of the levy of a tax for repairing the court-house, *held*, to be no ground for interference by the courts. A tax, levied professedly and improperly for one purpose, can be collected and applied to any other legitimate purpose. It is not fraudulent for a board of county commissioners to superadd their personal credit to the credit of the county, in a contract concerning the necessary expenses of the county.—*Long v. Commissioners of Richmond.*

JURY PANEL—DOWER INTEREST OF WIFE IN REAL ESTATE OF HUSBAND—INDICTMENT FOR BURGLARY—DESCRIPTION OF PROPERTY.—The statutory requirement that a *tales* juror shall be a freeholder, does not apply to the original panel. The finding of the court below, as to whether a challenged juror has paid his taxes, is final, and can not be reviewed in this court. The dower or homestead interest of a wife in the real estate of her husband is a mere *right*, which may never vest; not an *estate; therefore*, in an indictment for burglary for breaking into A's house, it is proper to charge that the house is the property of A alone. While a husband and wife live together, the husband has a special property as bailee in the wife's separate personal estate. *Therefore*, in an indictment for burglary, where a certain quilt, proven to have been stolen, was the separate property of A's wife, and was charged in the indictment as the property of A, *held*, not to be error. The verdict of a jury must be recorded substantially as rendered.—*State v. Wincroft*

SLANDER — WORDS CHARGING INFAMOUS OFFENSE.—Words falsely spoken, charging one with an infamous offense, or with an infectuous disease, or impeaching his trade or profession, are, *per se*, actionable. When the words spoken do not on their face import such degradation, the plaintiff must aver some special damage, and must show by proof that he has, in fact, sustained a loss, in order to recover. If, at the time of the utterance of the alleged slanderous words, the person concerning whom they are spoken is not liable to an infamous punishment by reason of the offense charged, the words are not, *per se*, actionable. *Therefore*, when the defendant, in 1870, said of the plaintiff that he had sworn falsely in 1867 before the Board of Registrars of Davidson County, then acting under the provisions of the act of Congress, entitled, "An Act to Provide More Efficient Government for the Rebel States," which act ceased to operate in this state before 1870, *held*, that the plaintiff, no special damage being alleged, could not recover.—*Pegram v. Stotlz.*

BANK RECEIVING CHECK FOR COLLECTION—PRINCIPAL AND AGENT.—When a bank receives a check for collection, and retains it for four days, without presenting it for payment, or making any effort for its collection, or giving any notice to the depositor of its non-payment, the bank is liable, if loss thereby ensues. In such case, a promise thereafter made by the depositor to pay to the bank the amount due by reason of the loss, is *nudum pactum*. When paper is placed in the hands of a bank for collection, the bank must take the necessary steps to secure its prompt payment, by presentation at maturity. If it is not paid, the bank, in order to fix the liability of the drawer, must have it protested, and due notice of its dishonor given to the depositor. If it is not presented, the fact, that if it had been presented, it would not have been paid, does not excuse the liability of the bank. When one voluntarily assumes an agency to manage the interests of another, such agent will not be allowed to sacrifice the interests of his principal to his own. *Therefore*, when a bank received a check upon itself for collection, being at the same time a large creditor of the drawer, and failed, without excuse, to notify the depositor of the non-payment of the check, *held*, to be, in law, negligence. In such case, the bank makes the check its own, and is fixed with its full amount.—*Bank of New Hanover v. Kenan.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1876.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE, } Associate Justices.
" WILLIAM E. NIBLACK, }
" SAMUEL E. PERKINS, }
" GEORGE V. HOWK, }

INSTRUCTIONS TO JURY—FACTS ADMITTED.—A court has no power to state to a jury what facts are proved; nor to state what facts are admitted by the parties, unless they are so admitted as facts to go to the jury as proof. Where no such admissions are made by the pleadings, nor appear in the evidence, an instruction which so assumes and states facts to be admitted as true, will be held erroneous. Judgment reversed. Opinion by BIDDLE, J.—*Mathers v. Story.*

LANDLORD AND TENANT—QUALIFIED ESTATE OF THE LESSOR.—1. A lessor of real estate can not give his lessee a larger estate in the demised premises than he himself has; and where the lessor has only the special and qualified estate of an administrator with the will annexed, the leasehold estate under him terminates when the order of the proper court terminates the estate of such administrator. 2. When the lessee has notice of the sale of the demised premises, he is bound to know that his lease under the ad-

ministrator is determined by such sale and conveyance. Judgment affirmed. Opinion by HOWK, J.—*Burbank v. Dyer.*

JUDGE AND JURY—ABUSE OF JUDICIAL DISCRETION.—After a jury had been out about fifteen hours in consultation, they came into court and reported that they could not agree. The court then asked them how much they lacked of agreeing, and the foreman replied: "About twelve dollars." The court thereupon told the jury they ought to agree; that it would be better for both parties they should overcome that difference, than to have another trial of the cause. *Held*, that this conversation by the court with the jury was not an instruction of law, but rather a direction as to fact, over which the court had no authority. Neither questions of expediency nor of policy have anything to do with the administration of justice. The court should not have inquired of the jury what the difference between them was, and the jury should not have answered the question. Judgment reversed. Opinion by BIDDLE, J.—*Newcall v. Hutchinson.*

FORECLOSURE—RIGHT OF REDEMPTION—TENDER.—A purchaser under a decree of foreclosure of a junior mortgage may redeem against a senior mortgagee, before foreclosure, and after foreclosure, if he has not been made a party to the suit. A junior judgment-creditor stands, in this respect, upon the same footing; and where one purchases land at sheriff's sale on a judgment, subject to a senior mortgage-lien, which is afterwards foreclosed without making the purchaser at the sheriff's sale a party, the latter has the right to pay off such older lien and protect his title; and in cases of this kind, where the court can decree the amount due, and make it a lien on the land, it is not necessary to make a tender before suit, nor to bring the money into court, but it is sufficient to make the offer in the pleadings to pay the amount, when it is ascertained. Judgment reversed. Opinion by HOWK, J.—*Coombs v. Carr.*

VENDOR AND PURCHASER—DEFICIENCY IN LAND SOLD.—Where the lands in a conveyance are estimated to contain so many acres, or the words "more or less" are added, if there be a small portion more than the specified quantity, the vendor can not recover it; and if there be a small quantity less, the purchaser can not obtain any compensation for the deficiency; and even a large excess or deficiency has not been considered a ground for relieving a vendor or purchaser, in the absence of fraud; representation, or other equitable circumstances affecting the particular case. In the absence of such conditions, a deficiency of one-tenth in the quantity of land purchased will not entitle the purchaser to compensation therefor, and such a deficiency will not constitute a good defense to a suit on a note given for the purchase price of the land. Judgment reversed. Opinion by PERKINS, J.—*King v. Brown et al.*

CONSTRUCTION OF WILL—UNCERTAINTY—INTENTION OF TESTATOR.—Where a will bequeathed all of the testator's real estate "to the County of Owen," to be sold, and the proceeds invested as a permanant fund for the education of the colored children of said county; *Held*: 1. That the testator intended to devise his estate to "The Board of Commissioners of Owen County," and that the name of the devisee was given with such certainty that it could readily be ascertained to what corporation the testator intended to devise his estate. 2. That the County of Owen, in its corporate capacity, was capable of holding as trustee the real estate so devised to it. 3. That the will was not void for uncertainty as to the *cestui que trust*. The beneficiaries were limited to the colored children of said county, and there was no vagueness or uncertainty as to the persons intended. Judgment reversed. Opinion by HOWK, J.—*Craig, Admr. etc. v. Secrist et al.*

In Maule v. Stokes, 3 Weekly Notes, 373, a ground rent created in 1806 was payable in "current silver money of the United States," and the tenant, in 1875, tendered an installment of the rent in silver dimes. The tender was held insufficient, under sec. 3586, Rev. Stats. which reads: "The silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment." The decision overruled that of Kohler v. Parrish, 2 W. N. 488 in which it was held that a mortgage created in 1846 for the payment of $5,000 in lawful silver money of the United States, could be paid in silver half dollars.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

NEGLIGENCE.—The plaintiff's evidence showed substantially the following facts: The plaintiff's intestate was a laborer in the employ of the defendant, assisting the defendant to build a bridge. Said intestate fell from said bridge and was killed. The fall was caused by a heavy step of the intestate on a defective board or plank, causing the plank or board to break in the middle, and allowing the intestate to fall about 25 feet. This plank was a part of a scaffold. The intestate and his co-laborers had erected said scaffold on the very morning that said accident occurred. How this particular plank came to be placed in said scaffold is not shown. There were plenty of good planks at the bridge from which to make a good scaffold. Whether any one knew, prior to the accident, or even suspected that this plank was defective, is not shown. The evidence, so far as it went, tended to show that all the planks were tested before they were used. It was not shown that the defendant was negligent in any respect whatever, and no negligence was shown against any one, unless it may be inferred from the foregoing facts. The defendant demurred to the plaintiff's evidence on the ground that it did not prove any cause of action against the defendant. The court below sustained the demurrer. *Held*, that the court below did not err in its decision. Opinion by VALENTINE, J.—*Kelly v. Detroit Bridge Co.*

HOMESTEAD.—A husband and wife gave a mortgage to G on their homestead and on other real estate belonging to the husband. Afterwards L obtained a judgment lien upon all the property belonging to said husband, except said homestead. Afterwards the husband and wife sold and conveyed to W a portion of the real estate, not occupied as a homestead, but covered by said mortgage and said judgment lien. Afterwards the husband died. His wife and family still occupy said homestead. The plaintiff in this action has a claim of $800 against the decedent's estate for money loaned to the decedent during his lifetime, which claim has been allowed by the probate court; but such claim is not secured in any manner by lien or otherwise. The estate is insolvent and unable to pay all its creditors in full. The plaintiff now seeks by this action to have the assets of the estate marshalled; to have G compelled to exhaust that portion of said real estate, occupied as a homestead, in payment of said mortgage, before resorting to any other property belonging to the estate; to have L compelled to exhaust said real estate belonging to W in payment of his (L's) judgment lien, before resorting to any other property belonging to the estate; and to have the administrator, in the meantime, restrained from paying said mortgage or said judgment lien from the proceeds of any property except said homestead, and said property sold to W. *Held*, that the plaintiff has no such superior equities over the family of the deceased as occupiers of said homestead, or over W as the purchaser of said land, as can be enforced, either in law or equity, and therefore, that this action can not be maintained. Opinion by VALENTINE, J.—*Calby v. Crocker et al.*

HABEAS CORPUS—FALSE PRETENSES.—1. Under section 672, Gen. Stat. 1868, p. 763, the judge or court, issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, even in case there is no defect in the charge or process, summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. 2. On the hearing and determination of a cause arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offense of having obtained money or property by false pretenses, the prosecutor, when examined as a witness, may testify that he believed the pretenses, and, confiding in their truth, was induced thereby to part with his money or property. 3. It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses

which are false, nor need the pretenses be the paramount cause of the delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with the property. 4. A pretense which is false when made, but true by the act of the person making the same, when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute. 5. To hold a person for trial, who is charged with obtaining money or property by false pretense, it must appear that the pretense relied upon relates to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient. Opinion by HORTON, C. J.—*Ex parte Snyder.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NEBRASKA.

January Term, 1877.

HON. GEORGE B. LAKE, Chief Justice.
" DANIEL GANTT, } Associate Justices.
" SAMUEL MAXWELL, }

EQUITABLE JURISDICTION.—A court of equity will grant relief against judgments obtained by fraud, surprise, or mistake, or when, from any cause, manifest injustice has been done. Judgment reversed. Opinion by GANTT, J.—*Horn v. Queen.*

COUNTY NOT LIABLE FOR NUISANCE.—A county is not liable at the suit of a private person, for damages occasioned by reason of the erection of a county jail in near proximity to his residence, nor if the jail be kept in so filthy a condition as to become an actual nuisance to persons living near it. Judgment affirmed. Opinion by LAKE, C. J.—*Wehn v. Gage Co.*

ACTION ON UNDERTAKING IN ATTACHMENT.—In an action on an undertaking in attachment, the petition should allege that the order of attachment was wrongfully sued out or obtained. It is not enough to state in the petition, that the attachment was quashed, and the property released by proceedings in error. Judgment reversed. Opinion by LAKE, C. J.—*Eaton v. Bartscherer.*

DESCRIPTION IN DEED.—When, in a mesne conveyance, the premises are described according to the government surveys, but without designating the county or state in which the lands are situated, and the deed was executed in the state, it will be presumed that the deed was intended to convey lands situated in this state. Judgment affirmed. Opinion by MAXWELL, J.—*Butler v. Davis.*

ATTORNEY'S LIEN ON JUDGMENTS.—An attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained. And this right is paramount to the rights of the parties in the suit. But he must file his notice of a lien, and the right to a lien against a debtor is restricted to the claim set forth in the notice. Judgment modified. Opinion by MAXWELL, J.—*Griggs & Ashby v. White.*

BEST EVIDENCE.—Where, in an action on notes given for a threshing machine, the defendant set up as a defense a breach of warranty, alleging that the warranty was in writing, and left with the agent of the plaintiff, the defendant can not introduce evidence on the trial of the cause, to show by parol what the contract was, without first taking the necessary steps to require the plaintiff, or their agent, to produce the contract. Judgment reversed. Opinion by MAXWELL, J.—*Birdsall v. Carter.*

TAXATION ACCORDING TO VALUE—DEBTORS.—1. Every person shall pay a tax in proportion to the value of his, her or its property and franchises, and can not be compelled to pay a tax greater than in proportion to the value of such property. 2. Under the provisions of section 21 of the general revenue laws, in the assessment of personal property, the tax-payer is entitled to have a deduction of *bona fide* debts owing by him, from the gross amount of his credits. Judgment reversed. Opinion by GANTT, J.—*Jones v. Seward Co.*

FORECLOSURE AGAINST ESTATE OF DECEDENT.—Under our statute, an action to foreclose a mortgage, executed by the deceased in his lifetime, may be brought and prosecuted to final judgment within the time fixed by the court for the payment of debts by the administrator. Such mortgage is not barred, as to the property which it covers, by a failure to present it to the court for allowance, as a claim against the estate. But unless so presented, the holder is confined to the mortgaged property, and can not share in the general assets of the estate. Judgment reversed. Opinion by LAKE, C. J.—*Nul v. Jones.*

RIGHT OF PROPERTY IN GOODS LEVIED UPON—LIABILITY OF SHERIFF.—1. A trial of the right of property in goods levied upon by third parties under sections 486, 487, and 488 of the code can only be had at the instance of the claimant. 2. If in such proceeding the jury find against the claimant, he can not afterwards maintain an action against the officer. If the jury find in favor of the claimant, the plaintiff in execution may tender the undertaking prescribed, and require the sale to proceed; and the officer will not be liable to the claimant, his remedy being upon the undertaking. Judgment affirmed. Opinion by MAXWELL, J.—*Storms v. Eaton.*

WARRANTY.—When the soundness of a piece of machinery is guaranteed by a warranty, one of the conditions of which is, that in case of a defect being discovered in any portion of it, the seller shall be liable only on condition of the production of the defective piece at the manufactory, or to the agent by whom it was sold, this is a condition precedent, and must be complied with, or there can be no recovery. Where the very defect complained of is fully and clearly covered by the warranty, no liability can be established against the seller, on the ground of fraud in not disclosing the defect, if known by him at the time of the sale. In such case, the purchaser must rely on the contract of warranty. Judgment affirmed. Opinion by LAKE, C. J.—*Miller v. Nichols, et al.*

COMPETENCY OF DEFENDANT TO TESTIFY IN MALICIOUS PROSECUTION—PROBABLE CAUSE—CONVERSION NOT LARCENY.—1. In an action for a malicious prosecution, the defendant is competent to testify as to his belief in the guilt of the plaintiff, when the prosecution was commenced; that he instituted the prosecution without malice, or in accordance with the opinion of counsel first obtained. 2. It is the duty of the court to determine whether the proof of certain facts constitutes probable cause, and it is error to submit this question to the jury. It is the duty of the jury to say what facts are proved, and to decide on the weight of evidence and the credibility of witnesses. 3. Mere conversion of property is not larceny, and information of such convertion constitutes no grounds of probable cause as a defense to such action. Judgment reversed. Opinion by GANTT, J.—*Turner v. O'Brien.*

ABSTRACTS OF DECISIONS OF SUPREME COURT OF IOWA.

[From the advance sheets of 43 Iowa.]

HON. WM. H. SEEVERS, Chief Justice.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JOSEPH M. BECK, } Judges.
" AUSTIN ADAMS,

ADMINISTRATION — PAYMENT TO HEIRS — PROMISSORY NOTE—CONSIDERATION — ILLEGAL CLAIMS.—1. The payment to the heirs of a debt due the estate of a decedent, and the possession of a receipt from them, does not discharge the debtor from liability to the administrator. 2. The settlement of an illegal and unfounded claim, upon which no proceedings had been instituted, does not constitute a sufficient consideration for a note. Opinion by BECK, J.—*Tucker v. Ronk.*

PROMISSORY NOTE — CONSIDERATION — PRACTICE — INSTRUCTION—VERDICT.—1. In an action upon a promissory note, it was pleaded that the title to the land for which the note was given had failed; but it appeared that the claimant under the adverse title had not succeeded in establishing his claim in an action for that purpose; *held* that the plea constituted no defense to the action. 2. A verdict, returned in conflict with an instruction of the court and entirely unsupported by the evidence, will not sustain a judgment. Opinion by DAY, J.—*Dawson v. Graham.*

PROMISSORY NOTE—INTOXICATING LIQUORS—COUNTER-CLAIM.—1. A contract for the sale of intoxicating liquors for purposes forbidden by law is void, and such sale, when the

object thereof is known to the seller, will not constitute a sufficient consideration for a promissory note for the purchase price. 2. If liquors thus sold have been paid for, the amount paid may be recovered back in an action at law; or, in an action by the seller against the purchaser upon a general account, the amount of such payment may be pleaded as a counter-claim. Opinion by BECK, J.—*Tallman v. Johnson.*

PRACTICE IN SUPREME COURT—BILL OF EXCEPTIONS—FRAUDULENT SALE.—1. Affidavits impugning the correctness of a bill of exceptions signed by the judge will not be considered by the Supreme Court, unless they are presented to sustain another bill of exceptions purporting to contain a correct statement of the evidence, and signed by two bystanders. 2. A sale of personal property without a change of possession or visible change of ownership raises the presumption that the sale is fraudulent. 3. Where there is evidence tending to support the finding of the court, it will be sustained like a verdict of the jury under similar circumstances. Opinion by SEEVERS, C. J.—*Woodworth v. Byerly.*

MORTGAGE—COVENANT—PRACTICE.—1. A valid covenant may be inserted in a mortgage, binding the mortgagor to pay the amount secured thereby at the time specified. 2. A mortgagee is not confined to the remedy of foreclosure, but may maintain an action at law upon the note, bond or other obligation secured by the mortgage. 3. If the covenant for payment or obligation is contained in the mortgage, that may be made the basis of the action at law. 4. If separate actions are commenced upon the covenant for payment of the money and for the foreclosure of the mortgage, the plaintiff may elect which he will pursue, and his election of the one will have the effect to continue the other. Opinion by BECK, J.—*Brown v. Cascaden.*

PRACTICE—REFEREE—CONTINUANCE—CONCLUSION OF LAW.—1. Where, upon a trial before a referee, one of the parties asked for a continuance on the ground that, although the time for taking testimony had expired, yet a deposition had not arrived, for the taking of which the commission had issued in due time; *held* that, upon a proper showing, this would be sufficient ground for continuance, but that, the affidavit not being verified, the motion was properly overruled. 2. A referee's report reciting that he was duly sworn before proceeding to discharge his duties, the failure to file with his report the affidavit required by statute, is not a fatal objection to it. 3. Where, by the terms of the submission, the referee was only empowered to find the facts, and, notwithstanding this, he also returned his conclusions of law, and the court rendered judgment on his report, it was *held* that prejudice must be shown by the act of the referee, to invalidate the report. Opinion by SEEVERS, C. J.—*Shindler v. Lake.*

GARNISHMENT—NOTICE—SERVICE—DELAY IN PROCEEDINGS—ASSIGNMENT OF JUDGMENT—ATTORNEY'S LIEN.—1. In a proceeding of attachment by garnishment, notice of the process to the defendant in the principal action is not necessary. 2. The garnishment process may be served before the defendant is served with notice of the commencement of the action. 3. That one or more terms intervened between the service of the garnishment process and the rendition of judgment against the garnishee was held not to imply an abandonment of proceedings. 4. A judgment debtor may be garnished, even though he has appealed from the judgment, if no supersedeas bond has been filed. 5. The assignment of a judgment, after service of the garnishment process, confers upon the assignee no rights prejudicial to the plaintiff in the garnishment proceeding. 5. The claim by an attorney of a lien upon a judgment must be given in writing to bind the judgment-creditor, or those claiming through him. Opinion by BECK, J.—*Phillips v. Germon.*

CONTRACT—CONSTRUCTION—EVIDENCE—WAIVER.—1. By the terms of a contract between W and a railway company, he became bound to pay the latter fifteen hundred dollars, if within a specified time it should have completed its road to West Union and have done half the grading between that place and the point of intersection with the M. & St. P. Railway; *held*, that the company had not complied with the contract by completing the road between West Union and the point of intersection named, while it failed to construct its road to West Union from the other direction, and that the road must have been completed to West Union on the one side, and half the grading done on the other. 2. A cotemporaneous agreement was not admissible to vary the terms of the written instrument. 3. If before the expiration of the time of performance W had said that he was satisfied with the modification of the terms of the contract, and had then promised payment, notwithstanding the modification, it might have been regarded by the company as a waiver of the conditions. Opinion by ADAMS, J.—*B. C. R. & M. R. R. v. Whitney.*

NOTES.

FOR a specimen of eccentricity, a testator residing in Bellingham, Mass., takes the lead. The will gives his wife the use of a portion of the house he owned in Bellingham, with the use of front garden in common with others; also the use and improvement of one stall in the barn, together with storage for hay, during her widowhood; four cords of wood to be consumed during her widowhood, said wood to be cut off a lot near the house; the use of the kitchen furniture and cooking stove, and one seat in a pew on the lower floor of the Second Congregational Church of Medway, on condition of her paying one-fourth of the tax assessed on said pew from year to year, also to pay all the taxes that may be assessed on the real estate. Each bequest contains the proviso, "as long as she remains a widow."

THE Nova Scotians are by no means the first people who have been in trouble about a Great Seal. When the Prince of Orange, in 1688-9, took the reins of government in England, there was no Great Seal. It was part of his Catholic Majesty's luggage when he left Whitehall; but James did not keep it for many minutes. With the impression on his mind that the government of the kingdom could not be carried on without it, he dropped it into the Thames with his royal hand. About a century later, when Lord Thurlow was High Chancellor, his house in Great Ormond street was broken into on the 24th March, 1784, and the Great Seal of England was among the property stolen. It was never got back from the thieves, but was replaced the next day by a new one. Later, William IV. was very angry with Lord Brougham for taking the Great Seal to foreign parts in his valise. A young lady once made it her pleasure to obtain the Seal from the gallant old lawyer, and compelled him to go down on his knees to her on a rather public occasion, before she would restore it to his custody.

A RECENT London letter, in speaking of the bench and bar of England, says: There has been an impression that the humorous judges, and those with some flavor about them, have passed away with Maule and Westbury, and that the bench is more and more occupied with dry perfunctionaries. But some little incidents have recently sent a smile around the court, which seem to warrant a more hopeful view. The other day a lawyer was arguing before Baron H——, and assumed a laughing tone at the case of his opponent, giving a little titter at each statement, as if the opposite side were too preposterous to be considered. The judge leaned forward and gently interrupted the barrister with, "Mr. ——, I am at a loss to know why you use this triumphant tone. Of course, if there were a jury present, I should not say a word; but you surely don't expect that tone to have any effect on me?" The barrister was funereal during the rest of his speech. In another case, Baron C—— was listening to a barrister, who seemed disposed to indulge in not only length, but eloquence. The judge interrupted, saying, "Mr. ——, is your client in court?" The barrister looked around, and said, "He was here a moment ago, your lordship, but he seems to have gone." "Then," said the judge, appealingly, "couldn't you spare *me* all this?" The court-room of Mr. Justice B—— was the scene of rather an alarming outburst of feeling on the part of the judge. A case came before him presenting a combination of every kind of villainy in the defendant; and, as the clear evidence came out, the judge grew red and white, and was fairly boiling when the time came to charge the jury. "Gentlemen of the jury," said the judge, "it is a perfectly clear case, and a most nefarious one. The defendant has unquestionably robbed the plaintiff, and has basely betrayed his daughter and abandoned her in a foreign land. I—*I only wish it had been my daughter!*" The lawyers gasped as this thunder rolled, and beheld the irate judge shaking his fist across the room at the cowering caitiff.